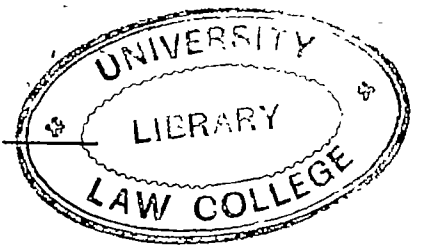
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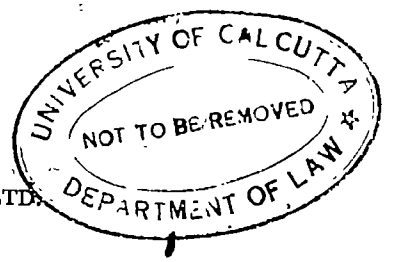
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BY THE SUPREME COURT OF INDIA
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" Kamal Chunder Chunder, B.A. (Calc.) M.A. (Oxon), I.C.S. Barrister-at-Law
" Kulada Charan Das Gupta, M.A. I.C.S Barrister-at-Law
" Surajit Chandra Lahiri, M.A., LL. B.
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" Prasanta Behari Mukherjee, Barrister-at-Law
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" Jyoti Prokas Mitter, B.A. (Oxon) Barrister-at-Law
" Braja Kanta Guha, B.A. (Calc) I.C.S.
" Himansu Kumar Basu, Barrister-at-Law
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" P. C. Mallick M.A., LL. B.
" P. C. Sarkar

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Junior Standing Council :
Mr. Asoke Kumar Sen.

Senior Standing Council :
Mr. Sankar Banerjee.

Senior Government Pleader.
Mr. Hemendra Kumar Das, M.A., LL. B.

General Editor :
Mr. Ramendra Mohan Mazumdar, M.Sc LL. B.

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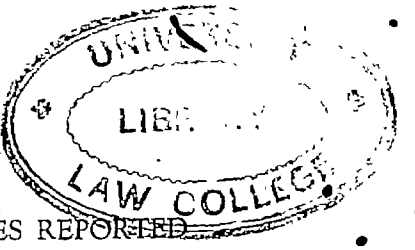


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The Calcutta Law Journal

VOL. 95. CALCUTTA. 1.

APPELLATE CIVIL.

Before Mr. Justice G. N. Das and Mr. Justice

D. B. Mookerjee.

PROVINCE OF BENGAL

v.

PROBASH CHANDRA GHOSE & ORS.*

CIVIL.

1953.

May, 1.

Article 180 of Schedule 1 of the Limitation Act—Title of auction purchaser whether becomes extinct on the expiration of three years from the date of confirmation of sale if no delivery of possession be taken through Court—Section 28 Limitation Act, scope of.

An omission on the part of the auction purchaser to take possession within three years of the sale being made absolute as required by Article 180 of Schedule I of the Indian Limitation Act does not extinguish the title of the auction purchaser. Such title may be extinguished either by transfer *inter vivos* or *invitum* or by the operation of some statute or by adverse possession.

Section 28 of the Indian Limitation Act contemplates a suit for recovery of possession of an auction purchaser of immoveable property as provided or in Article 137 or Article 138 of the Indian Limitation Act, that is, if the auction purchaser fails to take possession within a period of 12 years from the date when the sale becomes absolute, the title becomes extinguished under section 28 of the Indian Limitation Act and the title becomes transferred to the persons who were in possession for the requisite period.

The material facts will appear from the judgment.

Sitaram Banerjee and Jogneswar Mazumdar for the Appellant.

* Appeal from Appellate Decree Nos. 1754 to 1850 of 1946 and Nos. 691 & 692 of 1948 against the decrees of Sri R. Basu, Additional District Judge, 3rd Court, Alipur dated 20th December, 1945 in Rent Appeals 171 to 269/1944 respectively affirming the decree of Janab S. M. Rahman, Munsif, 1st Court, Baruipore, 24-Parganas, dated the 31st August, 1944.

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Rabindra Nath Bhattacharjee and Binoyendra Kumar Deb Roy Mahsay for the Respondent.

The Judgment of the Court was as follows:—

G. N. Das, J.:—These appeals are at the instance of the plaintiff and arise out of suits for recovery of rent.

The plaintiff claims rent on the strength of a purchase in execution of a certificate obtained by the plaintiff against one Anupama Dassi. The plaintiff's allegation is that by his purchase, the landlord's interest which was vested in Anupama Dassi passed to the plaintiff. Anupama's right to the reversion was derived in the following manner: The disputed lands appertain to three touzis one of which was numbered as Touzi No. 3241. This Touzi comprised 3 annas 6 gandas 2 karas and krantis share of the parent touzi 1484. Under this touzi the proforma defendants Nos. 2 to 11 were tenure holders. As the tenure holders did not pay rent, the proprietors of touzi No. 3241 viz., Purna Chandra Ghose and others instituted a suit for rent against the tenure holders impleading the co-sharer landlords and obtained a decree for rent. This decree was executed in Rent Execution Case No. 64 of 1933 and the tenure holders' interest was brought to sale and was purchased by the landlords Purna Chandra Ghose and others on the 1st November, 1933. The sale was confirmed on the 5th December, 1933. The auction purchaser viz., Purna Chandra Ghose and others sold their purchase right on the 15th June, 1935 to Anupama Dassi. The right of the plaintiff to receive rent was contested by the tenure holders in these Rent Suits on the allegation that as Purna Chandra Ghose and others the auction purchasers, did not take delivery of possession through Court within three years of the confirmation of sale as required by Article 180 Schedule 1 of the Indian Limitation Act, the title of the auction purchasers became extinct on the expiration of three years from the date of confirmation of sale, that is, on the 5th December, 1936. By the purchase in execution of certificate against Anupama Dassi the plaintiff did not acquire any right.

This defence was given effect to by the trial Judge and on appeal by Mr. R. Bose, the learned Additional District Judge,

24-Parganas. The courts below proceeded on the footing that as the auction purchasers at the time Rent Execution sale did not take delivery of possession within three years as required by law their right to recover possession by a suit against the tenure holders, the judgment-debtors of the Rent Execution Case, became barred, and therefore, the title of the auction purchasers ceased on the expiration of the said period of three years and, accordingly, the plaintiff did not acquire any title. This view was based on the Full Bench decision of this Court in *Kailash Chandra Tarafdar* v. *Gopal Chandra Poddar* (1). The effect of the Full Bench decision was considered recently by a Bench of this Court (in Appeal from Appellate Decree No. 201 of 1949) to which I was a party. In that case, the Bench was of the opinion that an omission on the part of the auction purchaser to take possession within three years of the sale being made absolute as required by Article 180 of Schedule 1 of the Indian Limitation Act does not extinguish the title of the auction purchaser. The Bench also pointed out that the title of an auction purchaser may be extinguished either by transfer *inter vivos* or *in invitum* or by the operation of some statute or by adverse possession. The Bench also pointed out that section 28 of the Indian Limitation Act contemplates a suit for recovery of possession of an auction purchaser of immovable property as provided for in Article 137 or Article 138 of the Indian Limitation Act, that is, if the auction purchaser fails to take possession within a period of 12 years from the date when the sale becomes absolute, the title becomes extinguished under section 28 of the Indian Limitation Act and the title becomes transferred to the persons who were in possession for the requisite period. In this case, no question of adverse possession can arise because at the date of the present suit for recovery of arrears of rent 12 years had not elapsed from the date when the sale became absolute. It was not proved in this case either that the judgment-debtors exercised acts of possession for more than 12 years and that by the operation of the rule of adverse possession, the title of the auction purchaser became extinguished. The Bench also pointed out that the effect of the Full Bench decision cited above was to disentitle the auction purchaser who has not taken delivery of possession through Court to recover by suit the possession of the property sold. The Bench also held that in the circum-

(1) (1926) 30 C.W.N. 649.

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stances like present, the title of the auction purchaser remains alive till it is extinguished by operation of law or by adverse possession or by transfer *inter vivos* or *in invitum*.

In this case, none of these exceptions has been proved. The right to receive rent which had previously vested in Purna Chandra Ghose and others by auction purchase was transferred to Anupama Dassi by private treaty and has since passed by certificate sale to the plaintiff. As this right of the plaintiff to recover rent has not been barred, the plaintiff is entitled to recover rent on the strength of title.

Mr. Banerjee relied on the fact that in regard to other portions of the land, auction purchased by Purna Chandra Ghose and others the plaintiff has been realising rent. It is not necessary to base our conclusion on this ground.

In these circumstances, the conclusion must follow that the plaintiff had the right to recover rent in all these suits and that the decision of the courts below cannot be sustained.

In the result, these appeals succeed. The judgments of the courts below are set aside and the plaintiff's suit will stand decreed.

As the question of law in controversy was in a somewhat unsettled state, we are of opinion that there should be no order for Costs.

D. B. Mookerjee, J.:—I agree.

B.N.B. *Appeals allowed.*

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Before Mr. Justice Chakravartti, C. J.,
and Mr. Justice S. R. Das Gupta

NEWTON HICKIE & ANOTHER

v.

THE OFFICIAL TRUSTEE OF WEST BENGAL*

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Code of Civil Procedure (Act V of 1908): Sec. 11—Resjudicata—Whether explicit decision is necessary—Sec. 11 Expl. IV, meaning of—Exparte decree—Applicablity of—General Principles of res-judicata—When applicable—Jurisdiction of Calcutta Small Causes Court in ejectment suits under the Rent Control Act—Whether exclusive.—Sec. 44 Evidence Act—Whether subject to Sec. 11, Civil Procedure Code—Whether can be pleaded as a bar—Two suits for ejectment re: two tenancies in the same building filed in the Calcutta Small Causes Court—Defence of a general nature taken—Suits decree ex-parte—Appeal and revision application taken out unsuccessful—Subsequent suit in High Court—Plea of one indivisible tenancy taken—Whether barred.

To constitute the bar of *res-judicata*, an explicit decision is not necessary. If an adjudication on a matter is necessarily involved in a decision, it is, for purposes of *res-judicata*, decided, Sec. II of the Civil Procedure Code, although it requires the matter in issue to be "heard and finally decided" in the former suit, itself recognises an implied decision.

The meaning of the sentence in Explanation IV that, any matter which might and ought to have been made a ground of defence or attack, shall be deemed to have been a matter directly and substantially in issue, is that such a matter shall also been deemed to have been heard and finally decided.

It is well settled in this country that even if a decree be *exparte* it will operate as *res judicata* in respect of all grounds of defence against the actual claim in the suit as also all matters inconsistant with such claim which might and ought to have been raised.

When the Court deciding the former suit is not competent to try the subsequent suit though the specific provisions of sec. 11 of the Civil Procedure Code do not apply, the general principles of *resjudicata*

* Re: Original Side Suit No. 3396 of 1952.

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are applicable in such a case. To invoke the general principles of res-judicata what is to be established is that the Court which heard and decided the former suit was a court of competent jurisdiction. The general principles of *resjudicata* are applicable to the decisions of the Small Cause Court, Calcutta, in ejectment suits under the Rent Control Act like those of any other court of exclusive jurisdiction, such as, Revenue or land requisition Court.

The Chief Judge of the Calcutta Small Causes Court functioning as a District Judge and Judge of that Court functioning as a subordinate Judge in ejectment suits under the Rent Control Act are special creatures of the Rent Control Act, exercising a specified jurisdiction and that jurisdiction alone. As such Judges, they can only try ejectment suits of the specified class and cannot try suits of any other kind. It would therefore seen that they are courts of a particular type, not known to the ordinary judicial system of the country and brought into existence for the purpose of trying a single class of suits and they exercise an exclusive jurisdiction both in the sense that they exercise no other jurisdiction and in the sense that the Jurisdiction they exercise cannot be exercised by any other court.

The reasons for holding that Sec 44 of the Evidence Act is subject to Sec. 11 of the code of Civil Procedure are strong and even if Sec. 11 of the code does so it will not reduce Sec. 44 of the Evidence Act to a nullity because in a case where the jurisdiction of the former Court did not depened upon the determination of an issue of fact between the parties or the existence of a particular state of facts, it would be still open to a party to show under Sec 44 an inherent and fundamental lack of jurisdict on.

All that the plaintiff is entitled to show under Sec. 44 of the Evidence Act is that the former suit as framed and laid and on the pleadings therein, was beyond the jurisdiction of the Court. If he can not establish such want of jurisdiction with respect to the particular suit, nor prove collusion or fraud, the decree will stand, concluding the matters determind by it. No question of the competency of the former Court to try the subsequent suit would arise in such a case at all, nor any question as to whether the plaintiff in the former suit should have brought a different kind of suit

Sec. 44 of the Evidence Act has nothing to do with the competency of the former Court to try the subsequent suit. It is concerned only with the competency of the former Court to try the former suit and with such competency of that court as a fact.

Two suits for ejectment in respect of two tenancies in the same building filed in the Calcutta Small Causes Court as suits specified in Sec. 16 of the Rent Control Act, 1950. The rents of the two tenancies

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were respectively Rs. 350/- and Rs. 375/- per month. The plaintiff and the defendant in the two suits were the same. The defendant put in written statements in both the suits but therein no direct issue of fact was raised except a number of general defences in the broadest of terms. Ultimately the suits were decreed *ex-parte*. The defendant referred appeal and then moved in revision before the High Court but was unsuccessful. Thereafter the defendant brought a suit in the High Court in its ordinary original civil jurisdiction averring that the tenancy of the said building was "one indivisible tenancy" carrying a rent of Rs. 725/- per month and denied that there were two several tenancies carrying respectively rents of Rs. 350/- and Rs. 375/-. Accordingly, the defendant prayed for a declarion that they were tenants and the decrees passed in the said two suits and the appeal the orders in revision were all invalid and void and not binding on the defendent—Held, that the decesions in the previous suits do involve a decesion that there were two several tenancies, that those decesions were validly given by a competent Court, that they find the dependent so as to defer him from agitating the same question again, and that the defendent could make out that the prior decrees were affected by any of the infirmities recognised by law.

The material facts will appear from the judgement.

A. N. Ray for the Appellants.

S. Banerjee for the Respondent.

The judgment of the Court was as follows :—

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CHAKRAVARTTI, C. J. : The only question argued in this appeal was a question of res*judicata* and, in the end, the only ground on which the bar of *resjudicata* was sought to be avoided was that the decision in the earlier suit was not a decision of a Court which was not competent to try the subsequent suit out of which the appeal had arisen.

The facts are not many and may be briefly stated A two-storied building. known as 69, Park Street, is admittedly situated within the limits of the ordinary original civil jurisdiction of this Court and in 1951, the Appellants, who may be compendiously called the Hickies, were admittedly in occuption

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of both the upper and lower flats as tenants. The premises belong to the Trust Estate N.B. Elias and R.O. Cohen and the trustee of the trust is the Official Trustee of West Bengal In 1951, the Official Trustee brought two suits for ejectment against the Appellants, one in respect of the upper flat and one in respect of the lower, on the basis that there were two several tenancies in respect of the two flats and that both the tenancies had been determined by notices to quit. In both the suits it was alleged that no rent had been paid since August, 1950, which, if established, would exclude the Appellants from the benefit of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, except to the extent provided for in section 14 According to the Official Trustee, the rent of the upper flat was Rs. 350/- per month and that of the lower flat Rs. 375/- per month and consequently he instituted the suits in the Court of the Chief Judge of the Calcutta High Court of Small Causes under section 16 of the Rent Control Act, read with Schedule 3. The suit in respect of the upper flat was Suit No. 323 of 1951 and that in respect of the lower flat Suit No. 318 of 1951. Actually, the suits were heard first by the third and finally by the fourth Judge on transfer to them by the Chief Judge which he ordered in excercise of his powers under the Rent Control Act.

The Appellants filed written statements in both the suits which were couched in identical language but for a small addition in one of them. Except that they denied service of notice, they raised no direct issue of fact, but merely put forward a number of general defences in the broadest of terms. They pleaded that the suits were not maintainable in the from adopted, but the Plaintiff to proof of the rest, denied the relationship of landlord and tenant, denying therewith that the Plaintiff had any right to sue or that any rent was due to him and finally denied that there was any cause of action. In suit No. 318, they added that the notice was malafide and illegal.

The suits were heard together. In the course of them, the plaintiff Official Trustee made two applications under

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section 14 (3) of the Rent Control Act by which he submitted that the defendants were not entitled to orders under section 14 (1), enabling them to deposit the arrears of rent and thereby avert ejectment. After certain adjournments, it was directed that the applications would be dealt with at the final hearing of the suits, along with all other issues, and after certain further adjournments, the 8th of December, 1951 was fixed as the date of hearing. On that date, the lawyer for the defendants stated to the Court that he had no instructions, but seems nevertheless to have made an application for time. The prayer was rejected and the cases were adjourned to the 10th December for orders. On the 10th December, the Court passed orders under Section 14 (1) of the Act, directing the defendants to deposit Rs. 6138-8-6 pies and Rs. 5823-8 as in suit no. 318 and Suit No. 323 respectively and to do so on the 15th day from the date of the order, as enjoined by section 14 (2). The cases were directed to be put up on the 3rd January, 1952 for orders. On the 3rd January, the defendants were absent and it also appeared that no deposit had been made by them. In those circumstances their defence against ejectment became liable to be struck out under the mandatory provisions of section 14 (4). The suits were accordingly deemed ex-parte with costs.

Against the decrees, the Hickies then preferred two appeals to the Chief Judge and another Judge of the Calcutta Court of Small Causes under Section 31 (6) (ii) of the Rent Control Act. The grounds taken were certain alleged irregularities of procedure and the alleged incorrectness of the findings that the appelants were defaulters and that the notices to quit were legal notices and their service had been proved. At the hearing, it appears only to have been argued that the appellants had been prejudiced by the refusal of certain adjournments and that the decrees could not lawfully be passed without formally striking out the defence against ejectment. The court repelled those contentions and dismissed the appeals. The Hickies then moved this court

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in revision, taking only the ground actually urged in the appeals, together with an additional ground that the appellate Court was wrong in stating that they had not filed certified copies of the judgements appealed from. On those applications two Rules were issued. At the hearing of the Rules, the complaint against the refusal of adjournments was repeated and the only other point urged was that because in the rent receipts granted by the Official Trustee, the names N. B. Elias and R. O. Cohen appeared in the description of the Trust Estate, it ought to have been held that they were the landlords entitled to sue and not the Official Trustee. This Court rejected the contentions and discharged the Rules, describing the revision petitions as "entirely without substance". The appeals to the Court of Small Causes were Appeals Nos. 157 and 158 of 1952 decided on the 24th April, 1952 and the revision case in this Court were Civil Rules Nos. 1351 and 1352 of 1952, decided on the 7th August, 1952.

It appears the on the 18th August, 1952, the Official Trustee obtained possession of three rooms on the first floor of the premises in execution of the decree passed in Suit No. 323 of 1951.

Thereafter, on the 22nd August, 1952, the Hickies brought in this Court the suit out of which the present appeal arises. They now admitted that they were tenants under the defendant Official Trustee, but averred for the first time that their tenancy in respect of the two flats on 69, Park Street was "one indivisible tenancy", carrying a rent of Rs. 725/- per month and they denied that there were two several tenancies, carrying respectively rents of Rs. 350/- and Rs. 375/-. As the Jurisdiction conferred by the Rent Control Act on the Chief Judge of the Court of Small Causes or a Judge nominated by him to try suits for ejectment was limited to tenancies carrying rents upto Rs. 500/- per month, the Hickies pleaded that the ejectment decrees passed by the Fourth Judge of the Court of Small Causes were "without any jurisdiction, authority and competency" and

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were nullities and that so were the orders passed by the Small Causes Court on appeal and those passed by this Court in revision. They accordingly prayed for a declaration that they were tenants in respect of premises No. 69, Park Street, a further declaration that the decrees passed in suits Nos. 318 and 323 of 1951 in the Court of Small Causes, the orders passed in Appeals Nos. 157 and 158 of 1952 in the same Court and the orders passed by this Court in Civil Rules Nos. 1351 and 1352 of 1952 were all invalid and void and not binding on them, an injunction restraining the defendant Official Trustee from executing the decrees, an order for recovery of posession of the three rooms on the first floor and leave under Order 2. R. 2 of the Civil Procedure Code.

By his written statement, the Official Trustee denied the allegations of the Plaintiffs and stated that the tenancy in respect of the upper flat had commenced in 1937 and that in respect of the lower flat in 1939 and that since then, there had always been two separate tenancies, carrying separate rents which had been separately enhanced from time to time. He accordingly contended that the Court of Small Causes was the only Court competent under the law to try the ejectment suits, in as much as the rent in the case of each of the flats was less than Rs. 500/- per month. He pointed out that the Plaintiffs had never suggested the course of the suits that the two flats formed parts of one tenancy and never raised any question as to the jurisdiction of the Court of Small Causes to try them and he pleaded further that the present suit was barred by the rule of *resjudicata*, or principles analogas thereto.

The suit came up for hearing before S. K. Mitter, J. who took up the question as to whether it was barred by *resjudicata* as a Preliminary issue. The learned Judge answered the issue in the affirmative. He held that on the facts set out in the Plaint of Suits Nos. 318 and 323 of 1951, the Court of Small Causes clearly had jurisdiction to try them. If the case of the Hickies was that there were no two several tenancies but

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only one tenancy, carying a rent of over Rs. 500/- and that therefore the Court of Small Causes had no jurisdiction to entertain an ejectment suit in respect of it, they might and ought to have raised the plea in bar of the jurisdiction of the Court. Not having done so, they were not entiled to raise the question in the present suit. The learned Judge held further that the fact that the Court of Small Causes was not a Court competent to try the present suit would not exclude the bar of *resjudicata*, because for ejectment suits in respect of tenancies carrying rents of less than Rs. 500/- per month, the Court of Small Causes was a Court of exclusive Jurisdiction and accordingly the principle laid down in the dicision of the Supreme Court *Raj Rakshmi Dasi* V. *Banamali Sen* (1) and the decisions of the Privy Council on which it was founded, would apply. It is the correctness of that decision which is challenged in the present appeal.

On behalf of the Appellants, it was contended by Mr. Ray that the decisions in Suits Nos. 318 and 323 of 1951 could not operate as *resjudicata* so as to bar the present suit because, first, those decisions involved no decision as to the jurisdiction of the Court of Small Causes and, secondly, because the Court of Small Causes was not a Court competent to try the present suit. He added that even if the question of jurisdiction had been impliedly or in effect decided in the earlier suits, he was entitled under section 44 of the Evidence Act to show that the decisions were not decisions of a Court competent in fact to give them.

Before dealing with these grounds, it will be convenient to refer to the provision of law under which the earlier suits were instituted in the Court of Small Causes. Previously, all suits for the ejectment of tenants from premises situated within in the limits of the ordinary original civil jurisdiction of the High Court had to be brought in the High Court and the Calcutta Court of Small Cause had no jurisdiction to entertain such suits. That Court could only make an order

(1) (1953) S. C. R. 154

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for possession under sec. 43 of the Presidency Small Cause Courts Act in respect of properties of which the annual value did not exceed two thousand rupees, but persons aggrieved by such an order could bring a suit in the High Court to establish their rights. Now, however, section 16 of the Rent Control Act of 1950 provides as follows.

> Notwithstanding anything contained in any other law, a suit by a landlord against a tenant in which recovery of possession of any premises to which this Act applied is claimed, shall lie to the Courts, as set out in Schedule B, and no other Court shall be competent to entertain or try such suit.

Schedule B provides that in the case of premises situated wholly within the ordinary, original, civil jurisdiction of the High Court, the appropriate Court for suits for ejectment against tenants shall be, where the monthly rent exceeds Rs. 500/-, the High Court and in all other cases, the Chief Judge of the Calcutta Court of Small Causes who shall be entitled to transfer the suit for trial to another Judge of the same Court. Since the premises in question in the present case are situated wholly within the original jurisdiction of this Court and since, according to the Official Trustee, there were two tenancies carrying rents of Rs. 350/- and Rs. 375/- per month respectively, suits for ejectment in respect of such tenancies could be brought only before the Chief Judge of the Court of Small Causes.

Regarded plainly and without reference to the technicalities of the law, the position which the Appellants are making the Court to accept in the present suit is an extraordinary one. Two ejectment suits were brought against them on the basis that there were two tanancies and they were brought in a Court, and in fact the only Court, competent to try them in view of the rents which the tenancies were said to carry. The Appellants did not say a word as to there being only one tenancy and not two and did not contend either that there could be no ejectment suits in respect of tenancies which did exist or that there being only one tenancy for the two flats

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carrying a rent of over Rs. 500/- per month, no suit for their ejectment from the premises could be entertained by the Court of Small Causes. Instead, they raised various other points and invited the Court to decide them. The Court decreed the suits against them and even when they appealed or, still later, when they moved this Court in revision, they made no mention at all of there being a single tenancy and raised no question whatever as to the jurisdiction of the Small Causes Court. After having gone through the whole course of the ejectment suits in three successive Courts without objecting at any stage to the Respondent's case of two tenancies or to the jurisdiction of the Court of Small Causes, they have now brought a suit on their own account in which they have raised such objections for the first time and are contending that inspite of the decisions in the previous suits, they are entitled to raise and agitate them. What they are saying is that the Court of Small Causes could not have tried the present suit and therefore whatever the decision of that Court in the earlier suits might be, it is no obstacle in their way. If the Appellant's contention be correct, a person can agitate the same question in any number of successive suits by merely adding to his case or changing the from of the relief prayed for, but if the law allows such a strange from of liberty, the same must be conceded. The position has to be examined

The ground on which the Appellants seek to avoid the previous decrees is that the Court of Small Causes had no jurisdiction to pass them. The answer with which the Respondent seeks to meet that contention, apart from his defence on the merits, is that the question is concluded by the previous decisions in favour of jurisdiction and is no longer open to the Appellants or triable by any Court. The question of the jurisdiction of the Court of Small Causes to pass the ejectment decrees is thus a matter directly and substantially in issue in the present suit. If it was also directly and substantially in issue in the former suits, whether expressly or constructively, and was decided, the Respondent's plea in

bar must prevail, subject to the Court of Small Causes being competent to try the present suit, if that qualification applies.

I am entirely unable to accept the first contention of Mr. Ray that the question of jurisdiction was not decided in the former suits. It was certainly not decided directly and in express terms, but to constitute the bar of *esjudicata*, an explicit decision is not necessary. If an adjudication on a matter is necessarily involved in a decision, it is, for purposes of *resjudicata*, decided. I do not consider it necessary to cite decisions in support of that proposition which is founded on the general principle of *resjudicata* and has been affirmed and re-affirmed in a multitude of cases, beginning with the decision of the Judicial Committee in the old case of *Soorjomonee Dayee* V. *Suddanund Mohapatter* (1) Indeed, section 11 of the Civil Procedure Code, although it requires the matter in issue to be "heard and finally decided" in the former suit, itself recognises an implied decision. The section says in Explanation IV that any matter which might and ought to have been made a ground of defence or attack, shall be deemed to have been a matter directly and substantially in issue. It does not proceed to say in express terms that such a matter shall also be deemed to have been heard and finally decided, but unless such be its meaning, there could be no purpose in introducing the Explanation at all. A matter which is deemed to have been in issue only constructively, could not, in the very nature of things, have been actually heard and decided and if such hearing and decision were nevertheless essential for the purposes of *res judicata*, the Explanation would be perfectly meaningless. It has accordingly been held, in case too numerous to mention, that if the decree passed in the earlier suit be inconsistent with a plea which might and ought to have been raised but was not, then for the purposes of *res judicata*, it must be taken to have been finally decided by necessary implication. In *Raja of Ramnad* V. *Velusami Tevar*. (2), Lord Moultion,

(1) (1873) I.A. (Supple. Vol) 212
(2) (1920) 48 I.A. 45

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after referring to an earlier order for the execution of a decree, proceeded to observe as follows : "To that order, the plea of limitation, if pleaded, would accordingly to the respondents' case, have been a complete answer and therefore it must be taken that a decision was against the respondents on the plea". The observation was made in an appeal arising out of an execution proceeding to which section 11 did not apply in terms, but the principle was nevertheless stated. In most of the decisions of the Judicial Committee their Lordships, after coming to the conclusion that a particular matter was constructively in issue in the prior suit, proceeded to hold that it was *res judicata* without further discussion, but the words "heard and finally decided" were specifically referred to and considered in *Patch Singh* V. *Jagannath Bakhsh*, (1) For a direct decision on the point, reference may be made to *Sri Gopal* V. *Prithi Singh*. (2) affirmed by the Privy Council in 29IA, 118 and followed in *Jamadar Singh* V. *Sherazuddin Ahmed Chaudhuri*. (3). At one time it was thought that the rule of constructive *res judicata* did not apply to the question of jurisdiction, but the matter has now been set at rest by the decision of the Supreme Court in *Mohanlal* V. *Benoy*, (4).

In the present case, the Appellants' objection to the jurisdiction of the Small Causes Court to pass the ejectment decrees is interlinked with their case on the merits. They say that the Small Cause Court had no jurisdiction to try the former suits, because there was but one tenancy for the entire premises, carrying a rent of Rs. 725/- per month, and accordingly no decree for ejectment from the subject matter of the tenancy or any part of it could be passed by the Small Causes Court. Clearly, this was a matter which might and ought to have been made a ground of defence in the former suits. They were concerned in defending themselves against the particular suits in which

(1) (1924) 52 I A. 200, 29 C.W.N. 749.
(2) (1897) 20 All. 110 (F.B.)
(3) (1908) I.L.R. 35 Cal. 979.
(4) (1953) S.C.R. 377

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decrees for ejectment were being asked for against them. If they pleaded that there were no two separate tenancies, as alleged, but only a single tenancy and succeeded in establishing that plea, the Court would have either returned the Plaints to the Respondent on the ground that it had no jurisdiction to try a suit in respect of the tenancy concerned or perhaps dismissed the suits on the ground that they related to tenancies which had no existence. In either event, the appellants would have defended themselves against the suits successfully. They did not take the plea of a single tenancy and the consequent want of Jurisdiction in the Court The suits were decreed. It must therefore be deemed to have been decided in one suit that there was a tenancy limited to the upper flat and in the other suit that there was a tenency limited to the lower and that each tenancy bore the rent alleged which was below Rs. 500/- and that conse quently the Court and jurisdiction to try the suits and pass the decrees. It must be remembered that the allegation in the case is not of a fundamental lack of jurisdiction but of a lack of jurisdiction arising out of the value of the subject matter. Since Jurisdiction depended upon the amount of the rent carried by the tenancies which again depended upon there being two tenancies or one, it depended upon a question of fact which it was within the power of the Court to decide in order to determine the question of its own jurisdiction. In passing the decrees, the Court must be deemed to have decided it against the contention of the Appellants, since the decrees are inconsistent with that contention. The argument of Mr. Ray that the decisions in the former suits do not involve any decision on the question of there being one or two tenancies and on that of the Courts jurisdiction cannot therefore be accepted.

Mr. Ray attempt to argue, somewhat faintly, that the decrees in the former suits were exparte decrees and therefore the decisions could at most operate as *resjudicata* on the questions directly decided. He sought to support his argument by reference to the decision of the House of Lords in

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New Brunswick Railway Co. V. British & French Trust Corporation. (1) But the decrees were exparte only in the sense that after filing their written statements and taking part in the proceedings for a considerable time, the Appellants defaulted in appearance during the last stages. At the stage of filing their defence and even at the stage of the Respondent's application under section 14(3) of the Rent Control Act they were before the Court and they did raise all such pleas as they considered to be open to them. In those circumstances, the principle laid down in the *New Brunswick Railway Co's case* (1) is excluded by the reasons which the Supreme Court gave in repelling an identical contention based on the same case in *Raj Lakshmi Dasi* V. *Banamali Sen* (2). Besides it is well-settled in this country that even if a decree be *exparte*, it will operate as *resjudicata* in respects of all grounds of defence against the actual claim in the suits as also all matters inconsistent with such claim which might and ought to have been raised. The question whether there were two several tenancies or only one and whether the Court of Small Causes had jurisdiction to try a suit for ejectment against the Appellant in respect of the premises in question was not merely incidental or ancillary to the Respondent's claim in the previous suits but went to the very root of his claim for ejectment, as brought. In my view, it is impossible for the appellants to avoid the effect of the decisions on that question on the ground that they were absent when the decree were

The next and the main contention of Mr. Ray was that even granting that the nature of the Appellant's tenancy and the qestion of the Court jurisdiction were decided on the previous suits, the decisions could not still operate as *resjudicata* in as much as the Court of Small Causes was not competent to try the present suit. It cannot be disputed that the Court of Small Causes is not competent to try a declaratory suit and that the only special jurisdiction conferred by the Rent Control Act on the Chief Judge or a Judge of his

(1) (1939) A.C. 1
(2) (1953) S.C.R. 154

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Court selected by him is to try suits for ejectment in respect of tenancies, carrying rent up to a certain limit. The present suit is a suit of a declaratory character and the declarations asked for include declarations regarding certain orders not only of the Appellate Bench of the Small Causes Court, but also of this Court. Mr. Ray contended that the present suit could not possibly have been tried by the Court of Small Causes and that therefore by reasion of the express provisions of section 11 of the Code of Civil Procedure, no bar of *resjudicata* was created by the decisions in the previous suits.

The above argument was advanced before the learned trial Judge as well, but he repelled it by holding that in respect of the previous suits, the Court of Small Causes was a Court of an exclusive jurisdiction and therefore the principle that in order that a prior decision might operate as *resjudicata*, the Court which gave it must have been competent to try the subsequent suit also, would not apply in the present case. The learned Judge relied on the decision of the Supreme Court in *Raj Lakshmi Dasi* V. *Banamali Sen* (1) where it was held that Courts of exclusive jurisdiction like Revenue Court, Land Acquisition Courts and Administration Courts were not entitled to try regular suits and therefore when a decision of such a court was set up as consistuting an estoppel by record, it was the general principles of *resjudicata* and not the specific provisions of section 11 of the Code which were to be regarded. These principles only required that the Court trying the previous case had jurisdiction to try it, but not also that it was competent to try the subsequent suit as well, which was a limitation engrafted on the general principles by the Code. The learned Judge applied that rule to the case before him and held that on the facts pleaded before it the Court of Small Causes had jurisdiction to try the suits and decide whether the Appellants were tenants under the Respondent and what the terms of the tenancy were. The decisions would therefore operate as *resjudicata* and preclude the Appellants from prosecuting the present suit.

(1) (1953) S.C.R. 154

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The learned Standing Counsel who appeared on behalf of the Respondent submitted that in applying the principle of the decision in *Raj Lakshmi Dasi* V. *Banamali Sen* (1) the learned trial Judge had been right. He referred to the provisions of section 16 of the Rent Control Act and pointed out that according to that provision, read with Schedule B, ejectment suits in respect of tenancies carrying a monthly rent of Rs. 500/- or less were to be tried by the Court of Small Causes and it had been expressly provided that "no other Court shall be competent to entertain or try such suit." The Court of Small Causes had thus been made a Court of exclusive jurisdiction in respect of the class of suits specified. I may point out a further indication that the Court created for the trial of such suits is a very special kind of Court. The jurisdiction to try such suits has not been conferred on the Court of Small Causes as such. But only on the Chief Judge of the Court who is to try them as a Court of the District Judge and on the Judge to whom the Chief Judge may transfer of a suit, who is to try it as a Court of a Subordinate Judge.

It appears to me that if the decision of the case turns on the rule of *resjudicata* the principle of the decision in *Raj Lakshmi Dasi* V. *Banamali Sen* (1) and the Privy Council decisions on which it is founded can be properly applied to the present case, although it would involved a slight extension. If the inability of a special court to try a regular suit takes its decisions out of the provisions of section 11 of the Code and makes the general principles of *resjudicata* applicable, the same reason would seem to attract the general principles to decisions of the Small Causes Court in ejectment suits under the Rent Control Act. The Chief Judge of that Court functioning as a District Judge and a Judge of that Court functioning as a Subordinate Judge are special creatures of the Rent Control Act, exercising a specified jurisdiction and that jurisdiction alone. As such Judges, they can only try

(1) (1953) S.C.R. 154

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ejectment suits of the specified class and cannot try suits of any other kind. It would therefore seem that they are courts of a peculiar type, not known to the ordinary judicial system of the country and brought into existence for the purpose of trying a single class of suits and they exercise an exclusive jurisdiction, both in the sense that they exercise no other jurisdiction and in the sense that the jurisdiction they exercise cannot be exercised by any other Court. If so, the test of being competent to try a subsequent suit of another kind must be as inappropriate in their case as in the case of Revenue or Land Acquisition Courts and the rule in their case must be that if they were competent to give the decision set up as a bar, it should operate as *res judicata* even if they were incompetent to try the subsequent suit.

It may seem strange that a decision of a Court entitled to try regular suits will not be *res judicata* unless it was also competent to try the subsequent suit, but a decision of a Court not entitled to try regular suits at all will be so, although the subsequent suit could not obviously have been tried by it. But a reason for this distinction can be seen. The basis of the limitation engrafted by the Code was explained by the Judicial Committee in *Misir Raghobardial* V. *Rajah Sheo Baksh Singh* (1) and again in *Rajah Run Bahadoor Singh* V. *Mussumut Lachoo Koer* (2). Their Lordships pointed out that in India there was a great number of courts of varying grades, the qualifications of whose Judges differed greatly and that it was not proper that the lowest of the Courts should be allowed to determine finally the title to the greatest estate in the Indian Empire. By requiring that in order that a prior decision might bar a subsequent suit, the court giving that decision should be a court of concurrent jurisdiction with respect to the subsequent suit, both as regards the pecuniary limit and as regards the subject-matter, that evil or inconvenience was avoided. This solution, however, cannot apply in the case of courts of an exclusive jurisdiction, because they cannot obviously have concurrent jurisdiction with respect to a subsequent suit, lying outside their sepecial province. Nor can there be any question of providing the

(1) (1882) 9. I. A. 197.
(2) (1884) 12. I. A. 23.

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better court for the purposes of a final decision in such cases. The Legislature having assigned a particular class of proceedings to the exclusive jurisdiction of such courts, it is they alone and not any other court which can decide them and, therefore, whatever the quality of such courts, the parties must be content with such decisions as they may give and once they have given a decision, it will bar a subsequent re-canvassing of the matters decided, so long as they are matters within their special jurisdiction or matters necessarily involved in such matters.

The decision of the present case on the general principles of *res judicata* on the footing that the court which decided the previous suits was a court of an exclusive jurisdiction may, however, be said to present one difficulty. Both the previous and the present proceedings are suits and since they are, it may be said that section 11 of the Code as in terms attracted. No court, says that section, shall try any suit in which the matter directly and substantially in issue has been directly and sustantially in issue in a former suit in a court competent to try such subsequent suit. "The condition as to the competency of the former court to try the subsequent suit", observed the Supreme Court in *Raj Lakshmi Dasi* V. *Banamali Sen* (1) "is one of the limitations engrafted on the general rule of *res judicata* by section 11 of the Code and has application to suits alone." Their Lordships thus made an exception in the case of suits. Again, in construing section 13 of the Code of 1882, which, in this regard, was in the same terms as the present section 11, the Judicial Committee observed in the case of *Gokul Mandar* V. *Pudmanund Singh & ors* (2), that "a decree in a previous suit cannot be pleaded as *res judicata* in a subsequent suit unless the Judge by whom it was made had jurisdiction to try and decide not only the particular matter in issue, but also the subsequent suit itself in which the issue is subsequently raised." There Lordships added that the essence of the Code was to be exhaustive on the matters in respect of which it declared the law and that it was not the province of a Judge to go outside the letter of the enactment. Since that

(1) (1953) S. C. R. 154.
(1) (1902) 29 I.A. 196

decision, it has always been held that if a case came within the terms of section 11, it would be governed entirely by the provisions of that section and there could be no room for the application of any general principles. Accordingly it may be said that the present case falls within the express terms of section 11, since both the present and the previous proceedings are suits and therefore there can be no *resjudicata*, since the Court of Small Causes was not competent to try the present suit which is a declaratory suit by the tenants.

In my opinion, that argument ought not to prevail. Were it to be accepted and the mere fact that the present suit is a declaratory suit by the tenants were held sufficient to exclude the bar of *resjudicata*, the decision in any ejectment suit tried by the Court of Small Causes might be set at naught and the dispute started over again by the institution of a declaratory suit in this court, even though the former suit might be perfectly and unquestionably within the jurisdiction of the Small Causes Court and even though no fraud might be alleged. A tenant would only have to ask for a declaration that the decree of the Small Causes Court was illegal and not binding on him which would at once avoid the bar of *resjudicata*, since the Small Causes court cannot try a declaratory suit or indeed any suit by a tenant. The law cannot be applied in a manner which will lead to so absurd a result. What the Applicants have really put to issue in the present suit is the question whether there were two several tenancies or only one and what they are really aiming at is to obtain a fresh decision on that question in their favour. The question of the jurisdiction of the Small Causes Court to try the former suits is only consequential. The substance of the position is that, on the merits of the case, the Appellants have suffered adverse decrees in the previous litigation in three successive courts and they have now brought a suit on their own account as plaintiffs, hoping to be able to avoid the bar of *resjudicata* by the form of the suit.

It was argued at the Bar that the present suit was a combination of two suits, one in respect of the decree in suit No. 318 and another in respect of the decree in suit No. 213 and it was suggested that the two suits should be regarded

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separately for the purposes of *resjudicata*. Reference was made to the class of decisions in which it had been held that a party could not avoid the bar of *resjudicata* by merely adding causes of action in a subsequent suit and thereby taking such suit out of the jurisdiction of the court which had tried the previous suit and also that if a portion of the claim in the subsequent suit was finally decided by a competent court in a previous suit, the subsequent suit would be barred by *resjudicata* to the extent of such portion, particularly when it was severable. Those decisions rest ultimately on the view that 'suit', as contemplated by section 11 of the Code, includes a part of a suit based on a distinct cause of action on which a separate suit could be brought. I do not however think that those decisions or the principles laid down in them can be of any assistance in the present case. Even if the Appellants had brought two separate suits, one in respect of each of the decrees and even assuming that the suits were not of a declaratory character, the Court of Small Causes would still not be competent to try them, since that court can try only ejectment suit and no suit at all brought by a tenant. It is therefore not possible to bisect the suit and hold that the Small Causes Court would be competent to try either of the two parts and so the previous decrees bar the present suit in respect of both of them. If the Appellants are debarred from agitating the questions they have raised in the present suit, it must be for some other reason.

In my view, the Appellants are debarred, because the present case is governed by section 44 of the Evidence Act and they connot possibly make out any ground under that section as to the incompetency of the previous decrees. It is not even that they have brought a suit for a declaration of a single tenancy and that the Respondent has set up the previous decrees under section 40 of the Evidence Act as having decided finally that there were two tenancies and as debarring the court from retrying the issue. The Appellants have asked directly for a declaration that the previous decrees are void and have not affected their status. Their first prayer is for a declaration that they are tenants in respect of the premises

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in question which means that inspite of the decrees in the previous suits directing their ejectment, their status as tenants is subsisting. In effect, it is a a prayer for a declaration of the invalidity of the decrees. Their second prayer asks for a declaration, specifically and severally, that the decree in suit No. 318 of 1951 and the subsequent appellate and revisional orders and the decree in Suit No. 323 of 1951 and the subsequent appellate and revisional orders are invalid and inoperative and are not binding on them. They have not alleged fraud or collusion. They can therefore succeed in the suit only if they can establish that the decrees were passed by a court not competent to pass them. Their learned Counsel contended that his clients were entitled by the very terms of section 44 to show that the previous decrees were not decrees of a competent court, but in my opinion they cannot succeed even on that basis.

An interesting discussion took place at the Bar as to whether as regards the question of the competency of the former court, section 44 of the Evidence Act must be read as subject to section 11 of the Code or *Vice versa*. In my opinion, that approach to the question cannot lead to a solution of the problem in the present case. The reasons for holding that section 44 is subject to section 11 are strong, because if it be not so, then even in a case where the question of the court's jurisdiction has been directly raised and directly decided in favour of jurisdiction up to the Court of the last resort, it would be open to a party to raise the question again, directly or collaterally, in a subsequent suit and impugn the jurisdiction of the former court. The view that section 11 governs section 44 will not reduce the latter section to a nullity, because in a case where the jurisdiction of the former court did not depend upon the determination of an issue of fact between the parties or the existence of a particular state of facts, it would be still open to a party to show under section 44 an inherent and fundamental lack of jurisdiction. But even assuming that section 44 of the Evidence Act is subject to section 11 of the Code, reliance on the latter section would at once import the condition as to the former court being competent to try the subsequent suit and therefore

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where, as in the present case, the subsequent suit could not have been tried by the former court and the bar of *res judicata* is sought to be avoided on that very ground, section 11 would lead nowhere as against section 44.

In my opinion, the present case falls to be judged by an altogether different principle. Section 44 of the Evidence Act has nothing to do with the competency of the former court to try the subsequent suit. It is concerned only with the competency of the former court to try the former suit and with such competency of that court as a fact. It follows that if the former suit, as framed, was within the jurisdiction of the court which tried it, the decree passed therein is a decree of a Court competent to pass it, such as it is. If a suit is subsequently brought for a declaration that the decree is void, having been passed by a court not competent to try the suit in which the decree was passed, all that the plaintiff is entitled to show under section 44 of the Evidence Act is that the former suit, as framed and laid and on the pleadings therein, was beyond the jurisdiction of the court. If he cannot establish such want of jurisdiction with respect to the particular suit, such as it was, nor prove collusion or fraud, the decree will stand, concluding the matters determined by it. No question of the competency of the former court to try the subsequent suit would arise in such a case at all, nor any question as to whether the plaintiff in the former suit should have brought a different kind of suit. In the case before us, the Appellants only asked for a declaration that the decrees passed in Suits Nos. 318 and 323 of 1951 were void and their status of tenants were an unaffected by those void decrees for the reason that the Court of Small Causes was not competent to entertain the suits. But the suits were suits for the ejectment of tenants from immovable property situated within the limits of the original jurisdiction of this court and they were suits in respect of tenancies said to carry rents of less than Rs. 500/- per month. The Respondent's case as to their being two separate tenancies and as to the rent carried by them being below Rs. 500/- in each case, was not even challenged. There can thus be no question that the Court of Small Causes was competent to try the suits, as they were and the decrees passed in the suits cannot be said to be

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decrees of a court not competent to pass them. I need not pause to consider what the position would be if the Appellants had brought a suit for the establishment of a tenancy carrying a rent of Rs. 725/- per month and the Respondent set up the previous decrees in bar of the suit or of the trial of an issue therein as to the nature of the tenancy. But the Appellants have brought a suit in which the relief they are themselves asking for is a declaration of nullity in respect of the previous decrees. It is a suit for setting aside the decrees. In such a suit asking for such relief, the only grounds of attack against the previous decrees open to the Appellants are those mentioned in section 44 of the Evidence Act and the only question, since there is no allegation of fraud, is the competency of the former court as respects the particular decrees impugned. That question must be decided solely by reference to the frame of the previous suits and the pleadings therein and the competency of the Small Causes Courts to try these suits without any reference to its competency to try the present suit. On that question, the Appellants have no case at all. If they have none, Section 44 of the Evidence Act can carry them no further and they have no grounds left on which they can challange the decrees.

I may refer in this connection to the decision of the Judicial Committee in *Rajwant Prasad Pande* V. *Ram Ratan Gir & ors* (1), where their Lordships made certain observations which are very apposite. There, a preliminary decree passed in a mortgage suit was set aside on the ground of non-service of summons on some of the defendants and a fresh preliminary decree was passed. When the fresh preliminary decree was going to be made final, some of the Judgment debtors objected that they had been given no opportunity to appear when the fresh preliminary decree was passed and therefore, as against them, the fresh preliminary decree was inoperative and not binding. The objection was over-ruled and a final decree was passed and the High Court affirmed that decision. Subsequently, the objecting judgment-debtors brought a suit for a declaration that the mortgage decree was not binding upon them. The High Court dismissed the suit on appeal in the view that the plaintiffs were estopped by the mortgage decree which had been finally confirmed. On further appeal to the Judicial Committee, their Lordships observed as follows :

> "It is contended before their Lordships, however, that this matter cannot be dealt with as *res judicata*; that it is open to suitors in India, who have exhausted the remedies competent to them, and after a final decree had been obtained against them, to institute a fresh suit, or series of suits, the object of which is to declare that a decree, competently and with jurisdiction obtained therein, is not applicable to them, though

(1) (1915) 42 I. A. 171—20 C. W. N. 35

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they are named in the decree. Their Lordships have no sympathy with that procedure. It is radically incompetent."

Proceeding to refer to be specific objections to the validity of the former decree, their Lordships observed that they must decline to make any prouncement on the matter as "the case under which these objections were brought forward was competently before the court; it had jurisdiction to entertain them". They concluded as follows :

> "This suit, in their Lordships' judgment, is equivalent to a suit for the rescission and destruction of a former decree of a competent court. That rescission and destruction could be obtained on the ground of fraud 'practised on the courts below'; but fraud had been eliminated from this case. Accordingly, these proceedings are, in their Lordships' judgment, a mere colour for a fresh suit on matters already competently settled by law."

In my opinion, though the facts of the case before their Lordships were not precisely the same, the position was fundamentally similar and the above observations apply to the present case with a peculiar force. Here too, there is no question of any fraud and here too the jurisdiction of the Small Causes Court to try the suits, as they were, is clear. Although their Lordships did not refer specifically to section 44 of the Evidence Act, it is clear that they had in their mind the terms or the principle of that provision.

For the reasons given above, I am of opinion that the decisions in the previous suits do involve a decision that there were two several tenancies, that those decisions were validly given by a competent court, that they bind the Appellants so as to debar them from agitating the same questions again, as the learned trial jugde rightly held and that the Appellants have not made out that the prior decrees are affected by any of the infirmities recognised by law. The appeal is accordingly dismissed with costs.

S. R. Das Gupta, J. :—I agree.

Mitra & Ganguly : Solicitors for the Appellant.

N. C. Boral & Pyne : Solicitors for the Respondent.

Appeal Dismissed.

B.B.

APPEAL FROM ORIGINAL CIVIL.

Before Mr. P. B. Chakravartti, Chief Justice and Mr. Justice Lahiri.

DWARKIN & SON LTD.

v.

HARI SINGH.*

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West Bengal Premises Rent Control (Temporary Provisions) Act (XVII of 1950), Section 12(1), Proviso, Clause (i)—Suit for ejectment whether the amount of the rent for the two consecutive months should be in arrear at the date of the suit.

West Bengal Premises Rent Control (Temporary Provision) Act, 1950, Section 12(3), meaning of the word "occasion"—Two consecutive months make a unit.

West Bengal Premises Rent Control (Temporary Provisions) Act 1950, Section 19(1) tender of rent—Valid tender, What is—The 'proper time' to make a tender.

West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, Section 20(1), extension of time to deposit rent when landlord refuses to accept proper tender—Default cannot be avoided after the expiry of the due date.

West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, Section 20(3)—Ambiguity in the language—Meaning of the section explained—No estoppel nor waiver when landlord accepts rent after the due date—Cause of action for ejectment suit governed by the general law—Protection provided in the Act.

Clause (i) of the Proviso to Section 12(1) of the Rent Control Act, 1950, does not require that the two months' rent referred to in it, should be actually outstanding at the date of the suit for ejectment and neither the phrase "is in arrears" nor the phrase "due from him" justifies a contray conclusion. The phrase legally "payable by the tenant" means obligatory on him under the law to pay' and the phrase "due from him" means 'unpaid and outstanding at the date when it falls due for payment.' Two months' rent may, in a case, be outstanding even at the date of the suit, but in order to constitute a default as contemplated by clause (i) it is not necessary that it must be so outstanding.

* Appeal from Original Decree No. 20 of 1954 against the judgment and Decree of Bose, J. dated 2nd February, 1954 in Title Suit No. 1560 of 1953.

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The two months contemplated by Clause (i) of the proviso to Section 12(1) are consecutive months and if they formed a single unit, it followed that the rent for both of them should be in arrear at the same time in order that a default as envisaged by the clause might occur.

The effect of the expression "on three occasions" in the proviso to Section 14(3) of the Rent Control Act, 1950, is to indicate the two months contemplated by clause (i) of the proviso to Section 12(1) to be consecutive—its effect is not to indicate that the rent for two such consecutive months should be simultaneously in arrear. If two consecutive months are taken together they make an occasion, the occasion being that for two consecutive months the tenant defaults in paying the rent on the due date. More is not required to satisfy the expression, because the element of consecutiveness is sufficient to find the two months together into a unit. Although two consecutive months are taken as a unit, they are not completly verified, because if they were, the rent of two months would be a consolidated amount and it would be impossible to find a time fixed by the contract for its payment or for a valid deposit of it under Section 19 to which reference has been made in Clause (i).

Under Section 19(1) of the Rent Control Act, 1950, a tenant can make a deposit only when the landlord does not accept the rent tendered by him. In order that a tender may be a valid tender, it must be made 'at a proper time' as required by Section 38 of the Contract Act. The 'proper time' to make a tender of rent must be the time fixed for its payment by the Contract or the fifteenth day of the next following month when there is no contractual time, as the case may be. What the Rent Control Act, 1950 provides is that the tenant must first tender the rent to the landlord within the time by which it is payable to him under the law and only if he refuses to accept a tender so made, does a right arise in the tenant to deposit the rent with the Rent Controller.

Under Section 20(1) of the Rent Control Act, 1950, when the landlord refuses to accept a proper tender, the tenant gets an extension of time for making a deposit upto a further fifteen days from the time of payment fixed by the contract or where there is no time fixed, upto the first day of the second month next following that for which the rent was payable. But the tenant cannot avoid a default by tendering the rent to the landlord even after the expiry of the due date and on landlord's refusing to accept the belated tender by depositing the rent with the Rent Controller.

Section 20(3) of the Rent Control Act, 1950, though ambiguous in language, cannot prevail over the direct provision of Section 19(1) of the Act. What the former section means is that the deposit with the Rent Controller shall be deemed to be payment to the landlord and it shall be so deemed if it is made within the time laid down in Section 20(1) and if the amount is such that it would be a sufficient tender at the date when the rent was payable to the landlord.

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When a landlord accepts rent tendered to him after the expiry of due date he is not debarred by the principles of estoppel and waiver from relying on Clause (i) of the proviso to Section 12(1) of the Rent Control Act, 1950, against the tenant.

Non-payment of rent is not cause of action for the landlord's suit for ejectment. That suit is governed by the general law except that the Rent Control Act provides a special protection to the tenant which is available to him on the conditions stated in the Act and not available in certain other circumstances specified. When one or other of the latter circumstances has occured, the Rent Control Act is out of the landlord's way and no action of his own erect it again as a barrier, unless the Act itself has so provided.

T. S. R. Sarma v. *Nagendra Bala Debi* (1); *Jyotindra Nath Mitra* v. *Sourindra Nath Dutta* (2); *Brojendra Coomar* v. *Srish Chandra Chatterjee* (3); *Kanto Mohan Mallick* v. *Jyotish Chandra Mukherjee* (4); referred.

The material facts will appear from the Judgment.

E. R. Meyor and Gouri Mitter for the Appellant.

A. K. Sen and D. Sen for the Respondent.

The Judgment of the Court was as follows:—

Chakravartti, C.J.:—An interesting and in a sense fundamental question under the Rent Control Act of 1950 is involved in this appeal. It is also a question of first impression in one of its aspects.

The facts are not indispute. The appellants are or, perhaps it would be more correct to say, were tenants under the respondent in respect of a large shoproom on the ground floor of premises Nos. 11A and 11B, Esplanade Row, East. They paid a rent of Rs. 695-12 annas per month. On the 11th April, 1953, the respondent issued a notice to them to quit the premises on the expiry of the month and on the 2nd May, 1953, he brought a suit for their ejectment on the Original Side of this Court. In order to exclude the Appellants from the benefit of the Rent Control Act, he pleaded that they had made default in the due

(1) (1952) 91 C.L.J. 188 (F.B.); 57 C.W.N. 1 (F.B.).
(2) (1950) 55 C.W.N. 123.
(3) (1953) 58 C.W.N. 225.
(4) (1945) 49 C.W.N.

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payment of two month's rent on three occasions within a period of eighteen months, though they had subsequently paid up that rent. The rent for September, 1952, had been paid on the 17th October following, that for October on the 19th November, that for November on the 17th December, that for December on the 19th January, 1953, that for January, 1953, on the 17th February following and that for February on the 17th March, 1953.

The respondent's further case was that the appellants had not at all paid the rent for March and April, 1953, but that case was abandoned at the trial. In their written statement the appellants took a plea of an understanding between the parties that the rent would be paid when an agent or servant of the respondent would call for it, but that case was also abandoned.

The parties adduced no oral evidence and raised no issue of fact. It appears that no time for the payment of the rent was fixed by the contract and accordingly the rent for each month would be payable by the fifteenth day of the month next following. On that basis, the parties went to trial on two pure questions of law which were (a) whether if was contemplated by Clause (i) of the proviso to Section 12(1) of "the Act that the amount of two months' rent" referred to in it should be out standing at the date of the suit for ejectment and (b) whether a landlord, who had accepted the rent paid to him after the due date, was debarred by the principles of estoppel and waiver from relying on Clause (i) of the proviso against the tenant.

Bose J., who heard the suit, decided both the questions in favour of the respondent. He held that Clause (i) of the proviso to Section 12(1) did not mean or imply that the amounts in respect of which default had been committed must remain unpaid till the date of the suit for ejectment. He held further, that although by accepting the rent after the due date, the respondent had made it impossible for the appellants to deposit it with the Rent Controller under Section 19 of the Act and thereby to avoid default, he was still not affected by either estoppel or waiver, since there could be no estoppel against a statute and since there was no obligation on a landlord to refuse to accept overdue rent. In the view of the learned Judge, as soon as defaults as contemplated by the Act occurred, the tenants' dis-

ability of his exclusion from the benefits of the Act accrued and a subsequent acceptance of the arrears by the landlord could not have the effect of removing the disability. In the result, the learned Judge decreed the suit and thereupon the present appeal was preferred.

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Before us, the same two points as had been taken before Bose J., were urged on behalf of the appellants by Mr. Meyer, but he placed his contention on the first point on a new ground and added a branch to it. Before Bose J., the appellants had relied entirely on the words 'is in arrears', occurring in Clause (i) of the proviso, and contended that the clear effect of those words was to desiderate that there must be present arrears at the point of time contemplated which was said to be the date of the suit. Mr. Meyer did not press that contention. He conceded that by reason of the qualifying words used in the clause, the expression 'is in arrears' could not be said to bear the meaning attributed to it on behalf of the appellants before the trial Court, but he contended that the same result followed from the words 'due from him' which were also to be found in the clause. In the second place, he contested that even assuming that in order that Clause (i) might apply, the 'two months' rent' contemplated by it need not be outstanding at the date of the suit, it was still essential that the two months should be consecutive months and that there should be some point of time at which the rent for both of them remained due and unpaid so that defaults in respect of two consecutive months co-existed. On the question of estoppel and waiver, Mr. Meyer took the same line as learned Counsel in the trial Court.

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Since the argument on the first point was of a textual character, it will be convenient, before dealing with it, to set out the provisions of sub-section (1) of Section 12 and of Clause (i) of the proviso. They read as follows:

12(1) Notwithstanding anything to the contrary in any other Act or law, no order or decree for the recovery of possession of any premises shall be made by any Court in favour of the landlord against a tenant, including a tenant whose lease has expired:

Provided that nothing in the Sub-section shall apply to any

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suit for decree for such recovery of possession—

(i) subject to the provisions of Section 14, where the amount of two months' rent legally payable by the tenant and due from him is in arrears by not having been paid within the time fixed by contract or in the absence of such contract by the fifteenth day of the month next following that for which the rent is payable or by not having been validly deposited in accordance with Section 19.

The facts of the present case, it will be recalled, are that although the rent for none of the months from September, 1952 to February, 1953, was paid by the fifteenth day of the next following month, yet it was paid before the rent for the next month fell due. At no date, therefore, was the rent for two consecutive months due at the same time and at the date of the suit, there were no arrears at all. It follows that if Clause (i) of the proviso requires that at the date of the suit for ejectment, the amount of the rent for two consecutive months should be outstanding the clause does not apply in the present case. Even if it at least requires that the amounts of the rent for two consecutive months should be simultaneously in arrear at some point of time, it has no application.

Mr. Meyer's contention, as I have already stated, was that the first requirement was contained in the words 'due from him.' His further contention was that the second requirement was contained in the words 'the amount of two months' rent' and also in the words 'default in payment of the rent referred to in Clause (i) of the proviso to Sub-section (1) of Section (12) on three occasions within a period of eighteen months', occuring in the proviso to Section 14(3) of the Act.

As pointed out by Bose, J., the question whether for the application of Clause (i) of the proviso to Section 12(1) it is necessary that two months' rent must be in arrear at the date of the suit for ejectment, is really concluded by the majority judgment in the Full Bench Case *T. S. R. Sarma* v. *Nagendra Bala Debi* (1), delivered by myself. At one stage of his argument

(1) (1952) 91 C.L.J. 188 (F.B.); 57 C.W.N. 1 (F.B.).

Mr. Meyer submitted that although an opinion against his present contention had undoubtedly been expressed in the Full Bench Case, it had really not been intended to decide the point and therefore his contention was still open to him. If I understood him a right, he subsequently modified that view. In any event, it appears to me that the opinion expressed in the Full Bench Case cannot be treated as a mere *obiter dictum*. One of the questions referred to the Full Bench was whether the case of *Jyotindra Nath Mitra* v. *Sourindra Nath Dutta* (1), so far as it construed section 14(4) of the Act, had been rightly decided. For overruling the decision, as the Full Bench did, it was necessary to construe Section 14(4) and for construing Section 14(4) and particularly the words "if any" therein on which the earlier decision had relied, it was necessary to construe Clause (i) of the proviso to Section 12(1). In construing the clause, the majority of the Full Bench clearly held, as appears from page 14 of the report, that it did not require that the tenant should continue to be a defaulter up to the date of the suit. The first contention of Mr. Meyer is thus concluded by an authority which is binding on all Benches of this Court, but I shall still consider it and examine the ground on which it was based.

Mr. Meyer did not rely on the words 'is in arrears' and conceded that since the clause had not used the words *simpliciter*, but only spoke of rent being in arrear 'by not having been paid within the time fixed by contract . . . . . or by not having been validly deposited in accordance with Section 19; it must be taken to have used the word 'arrears' only in the limited sense indicated by the qualifying words. What the clause meant was that if the rent for two months was not paid or deposited within the time limited by law, that fact was sufficient to impress such rent with the character of 'arrears' for the purposes of the clause and the expression 'is in arrears' only meant that such a fact had happened. By itself, it did not mean further that the rent was continuing to remain in arrear. That view of the expression 'is in arrears', is plainly right, despite the use of the verb 'to be,' in the present tense. Where the intended meaning otherwise and if the present existence of an outstanding amount was contemplated, there was no reason why the clause should have specified in what manner the rent should be in arrear and then said that it should be in arrear by not having been paid or

(1) (1950) 55 C.W.N. 185.

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deposited within the time limited by law, but not said that it should be in arrear by not having been paid or deposited upto the date of the suit. A requirement that rent for two months should be due and unpaid at the date of the suit cannot therefore be spelt out of the words 'is in arrears.' Mr. Meyer, however, contended that such a requirement had been laid down by the words 'due from him.' Those words, he said, must be given some meaning. If they did not mean that two months' rent must be still due, they added nothing to the words 'legally payable by the tentant' and to construe them as not bearing that meaning would be to convict the Legislature of either tautology or the enactment of an useless phrase.

I find myself wholly unable to accept the contention of Mr. Meyer like the words 'legally payable by the tenant,' the words 'due from him' constitute an adjectival phrase and both are used to describe the two months' rent with respect to which it is subsequently said that it should be in arrear in the sense of not having been paid or deposited within the time limited by law. The words 'due from him' embody a condition antecedent and not a condition subsequent. It is rent already due from the tenant which, in view of the clause, becomes rent in arrear in a certain sense and in a certain way. Clearly, the word 'due' in the phrase 'due from him' has reference to the point of time at which the rent concerned is payable and not being paid, becomes an amount in arrear. It has no reference to any subsequent point of time and, placed as it is, it cannot be read as laying down or carrying an implication that the rent must be in arrear even at the date of the suit. If the words in Clause (i) had been 'is in arrears by not having been paid within the time fixed by contract . . . . . or by not having been validly deposited in accordance with Section 19, and is due from him,' the construction put forward by Mr. Meyer would have been a tenable one.

A part from the true grammatical construction of the language of Clause (i) of the proviso, it appears to me that the view contended for by Mr. Meyer would lead to an extraordinary result. If it is to be held that the clause requires the rent contemplated by it to be unpaid and outstanding, it cannot be possible to stop at the date of the suit. Section 12(1), to which Clause (i) is a proviso, does not say that no suit for recovery of

possession shall be brought against a tenant, but that 'no order or decree for recovery of possession' shall be made against him. Then the proviso begins by saying that nothing in the Sub-section shall apply in certain cases which means that the rule against making an order or decree for recovery of possession shall not apply. One of the cases contemplated by the proviso and mention in Clause (i) thereof is that the amount of two months' rent is in arrear. If the clause means that the rent must be outstanding, the effect of the clause, read with the opening and operative words of the proviso, will be that the bar against making an order or decree for possession shall not apply and such an order or decree can be made only if, at the time of making the order or decree, the rent is still due and unpaid. It is impossible to hold that such could be the intention of the clause. To read it in that way will be to create the result that even if the tenant fails to pay the rent directed to be paid by an order under Section 14(1) within the time fixed by the order, the Court will still be unable to make an order or decree for possession against him if only he pays up the arrears so as not to leave two months rent outstanding just as the Court is about to make the order or decree. The exception contained in Clause (i) of the Proviso will, in such a case, no longer apply and the bar imposed by the main provision of Section 12(1) will come into operation. It is noticeable that while Section 14(3) provides that the suit, so far as it is a suit for ejectment, shall be dismissed if the tenant makes the payment directed to be made under Section 14(1), it says nothing as to what will happen if the tenant does not pay. Obviously, the whole suit will be proceeded with. It will appear further that, on the construction of Clause (i) of the proviso suggested by Mr. Meyer, even a default on three occasions within a period of eighteen months will not disable the tenant altogether from availing himself of the protection of Section 12(1), because if he pays up the arrears so as not to leave two months' rent outstanding even on the last date of the suit, the Court will be unable to make a decree or order for possession. The penalty provided for in the proviso to Section 14(3) is only forfeiture of the protection 'under this section' and not forfeiture of the protection under Section 12(1). I am entirely unable to accept a construction of Clause (i) of the proviso to Section 12(1) which will thus defeat altogether the provisions of Section 14 to which it has expressly been made

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subject, the words 'subject to the provisions of section 14' with which the clause opens can only mean that although a tenant may be in default in the sense indicated in the clause, he may still escape the consequences of such default if he pays up in accordance with an order under Section 14, whatever may be found due from him at the time. They can mean— nothing more. In my view, the clause does not require that the two months' rent, referred to in it, should be actually outstanding at the date of the suit for ejectment and neither the phrase 'is in arrears; nor the phrase 'due from him' justifies a contrary conclusion. The latter words are not superfluous. While 'legally payable by the tenant' means 'obligatory on him under the law to pay', 'due from him' means 'unpaid and outstanding at the date when it falls due for payment.' Two months' rent may in a case be outstanding even at the date of the suit, but in order to constitute a default as contemplated by Clause (i), it is not necessary that it must be so outstanding.

At one stage of his argument, Mr. Meyer referred also to the provisions of Section 14(1) and contended that since that section required the Court to determine the rent payable by the tenant and make an order for its payment, implied that there must be an amount of two months' rent due at the date of the suit. Ultimately, he conceded that he could derive no assistance from the terms of Section 14(1). It is clear that Section 14(1) furnishes no guidance on the present question. A determination of the rent payable may be necessary under the section even if less than two months' rent was due at the date of the suit or even if arrears had accrued due since the institution of the suit, although at the date of its institution there were no arrears outstanding.

It may seem somewhat strange that the landlord should be able to accept overdue rent and yet be able to rely on default in respect of the payment of the same rent for the purposes of the ejectment of the tenant. But a little reflection will show that there is no strangeness in such a provision. The cause of action for the landlord's suit for ejectment is not non-payment of rent. He has to establish his right to eject on other grounds. Non-payment of rent is only a ground for refusing to the tenant the special protection provided for by the Rent Control Act and for with holding from him the special defence. If the Act has pro-

vided that in order that the tenant may forfeit the benefit of the Act, it is not necessary that he should be actually in arrear but it is sufficient if he is unpunctual in the payment of rent to the extent and degree specified, it cannot be said to have made an unjust or unintelligible provision.

The second branch of Mr. Meyer's argument on the first point was that, in any event, clause (i) required that the rent for two consecutive months should be simultaneously outstanding at some point of time. He contended that the Act regarded two months as making up a unit for the purposes of default, as appeared from the proviso to section 14(3) and as had been held by Chunder J., in the case of *Brojendra Coomar* v. *Sirish Chandra Chatterjee* (1). The two months contemplated by clause (i) of the proviso to section 12(1) were therefore consecutive months and if they formed a single unit, it followed that the rent for both of them should be in arrear at the same time in order that a default as envisaged by the clause might occur.

For the purposes of the present case, it is not necessary to decide whether the two months referred to in clause (i) of the proviso are consecutive months, because the six months in respect of which default was committed were in fact all consecutive. I may, however, say that I agree entirely with Chunder J., that the two months contemplated by the clause are consecutive months. The reference to the clause (i) of the proviso to section 12(1) in the proviso to section 14(3) is a kind of an elucidation of its meaning and the expression 'default in payment of the rent referred to in clause (i) of the proviso to sub-section (1) of section 12 on three occasions within a period of eighteen months' does certainly imply that each occasion is constituted of two months and those two months are successive. As Chunder J., very pertinently points out, 'if default in respect of any six months was intended, it would have been sufficient and more appropriate to say,' on six occasions within a period of eighteen months.' It cannot by any means be said that since clause (1) of the proviso does not speak of 'two months' rent,' but only of 'the amount of two months' rent', even fractional arrears in respect of any number of months' or of months

(1) (1953) 58 C.W.N. 225.

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separated from each other one another would satisfy the clause, so long as the total of the arrears was equivalent to two months' rent. Such a construction would be fantastic. But because the two months in respect of which defaults should occur, are intended to be consecutive, it does not follow that the rent for two consecutive months should be in arrear at the same time. I find nothing in the clause to warrant such a view and Chunder J., did not so hold in the case cited. He had no occasion to consider the point, because although, in the case before him, default in respect of six months had occurred, the last two of the months were not consecutive which was sufficient to enable him to hold that clause (i) of the proviso did not apply. In my view, while the effect of the expression 'on three occasions' in the proviso to section 14(3) is to indicate the two months contemplated by clause (i) of the proviso to section 12(1) to be consecutive, its effect is not also to indicate that the rent for two such consecutive months should be simultaneously in arrearer. If two consecutive months are taken together, they make an occasion. the occasion being that for two consecutive months the tenant defaults in paying the rent on the due date. More is not required to satisfy the expression, because the element of consecutiveness is sufficient to bind the two months together into a unit. Indeed, it seems to me that although two consecutive months are taken as a unit, they are not completely unified, because if they were, the rent for two months would be a consolidated amount and it would be impossible to find a time fixed by the contract for its payment or for a valid deposit of it under section 19 to which reference has been made in clause (i).

The second point urged by Mr. Meyer was one of estoppel. He contended that if the Respondent had not accepted the rent when it was tendered to him the Appellants could have deposited it with the Rent Controller under section 19(i) and thereby avoided default, but by accepting the rent, the Respondent had prevented the Appellants from having recourse to the method of a deposit and therefore he was prevented from relying on the defaults for the purpose of invoking clause (i) of the proviso and excluding the Appellants from the benefit of section 12(1). In my view, no question of estoppel arises. Bose J., held that by accepting the payment of the overdue rent, the Respondent

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had deprived the Appellants of the opportunity of depositing the rent with the Rent Controller. With great respect, I am unable to agree with him. Under section 19(1) of the Act, a tenant can make a deposit only when the landlord does not accept the rent tendered by him. A deposit must therefore be preceded by a tender and a refusal to accept and it appears to me that if it is only the refusal of a tender which gives the tenant the right to deposit the rent, the tender must be a valid tender. A tenancy is held under a contract and therefore in order that a tender may be a valid tender, it must be made 'at a proper time' as required by section 38 of the Contract Act. The proper time to make a tender of rent must be the time fixed for its payment by the contract or the fifteenth day of the next following month when there is no contractual time, as the case may be. What the Rent Control Act provides, it appears to me is that the tenant must first tender the rent to the landlord within the time by which it is payable to him under the law and only if he refuses to accept a tender so made, does a right arise in the tenant to deposit the rent with the Rent Controller. When the landlord refuses to accept a proper tender, the tenant gets an extension of time under section 20(1) for making a deposit up to a further fifteen days from the time of payment fixed by the contract or where there is no time fixed, up to the first day of the second month next following that for which the rent was payable. The landlord suffers his perversity by the payment being delayed for some time and the tenant gets an accommodation for the inconvenience to which he is put. But it cannot be that the tenant may tender the rent to the landlord even after the due date has passed and if the landlord refuses to accept the belated tender, the tenant may yet deposit the rent with the Rent Controller and avoid a default. If such was the intention of the Act, there could be no meaning in making a provision for payment to the landlord by the time fixed by the contract or in the absence of such a time, by the fifteenth day of the next month. It might well have been provided straightaway that the tenant would be entitled to pay the rent for any month within fifteen days of the time fixed by the contract or within the first day of the second month next following the month concerned. Nor could there be any meaning in interposing a tender to the landlord. It might well have been provided straight away that a tenant would be entitled to pay

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the rent within the time prescribed either to the landlord or the Rent Controller. It appears to me to be perfectly clear that the scheme of the Act is entirely different. It provides for both direct payment or the rent to the landlord and for its indirect payment to him through the Rent Controller, but before the method of indirect payment can be resorted to, it is necessary that a proper and valid attempt at a direct payment should be made. To confine ourselves to the present point, clause (i) of the proviso to section 12(1) speaks of a valid deposit in accordance with section 19. Section 20(1) prescribes the time for a valid deposit for the purposes the clause (i) of the proviso to section 12(1). In between occurs section 19 and that section provides that a deposit with the Rent Controller can be made only when the landlord has refused to accept the rent tendered by the tenant. For the reasons I have already given, such tender must be a tender made within the time by which the rent is payable to the landlord.

Mr. Meyer drew our attention to section 20(3) of the Act which provides that if the rent is deposited within the time mentioned in sub-section (1) 'the deposit shall constitute payment of rent to the landlord if the amount deposited would have been valid legal tender of rent if tendered to the landlord on the date fixed by contract for payment of rent when there is such contract or in the absence of such contract on the fifteenth day of the month next following that for which the rent is payable.' It was contended by Mr. Meyer that since the section spoke of the deposit itself constituting payment to the landlord, it implied that no prior tender to the landlord was necessary and that the same implication was to be found in the reference to the amount which 'would have been valid legal tender of rent if tendered to the landlord.'. In my opinion, the contention is in direct conflict with the clear provision contained in section 19(1) and cannot be accepted. I must say, however, that taken by itself, the second of the expressions relied on by Mr. Meyer does lend some countenance to his contention, but it is unfortunately not always possible to take the draftsman of the Rent Control Act too literally as, in many respects, he appears to be disdainful of the rules of grammar. In any event, the involved and ambiguous language of section 20(3) cannot prevail over the direct provisions of section 19(1). What the former section means, I think, is that the deposit with the Rent Con-

troller shall be deemed to be payment to the landlord and it shall be so deemed if it is made within the time laid down in section 20(1) and if the amount is such that it would be a sufficient tender at the date when the rent was payable to the landlord, the deposit with the Rent Controller being necessarily made at a later date.

In the view indicated above, there was no valid tender to the Respondent in the present case within the time by which such a tender could be made. On the dates in which the rent was tendered to the Respondent and accepted by him, there was no longer any right in the Appellants to make a deposit with the Rent Controller and therefore by the Respondent's acceptance of the rent, the Appellants were in no way made to alter their position and were not affected in regard to any of their rights. The plea of estoppel therefore fails.

Mr. Meyer did not address us separately on the question of waiver which he formulated at the beginning of his argument. Indeed, he conceded that if we did not accept his construction of sections 20(1) and 20(3), the grounds of estoppel and waiver would not be available to him. I do not think any question of waiver can possibly arise, seeking that non-payment of rent is not the cause of action for the landlord's suit for ejectment. That suit is governed by the general law except that the Rent Control Act provides a special protection to the tenant which is available to him on the conditions stated in the Act and not available in certain other circumstances specified. When one or other of the latter circumstances has occurred, the Rent Control Act is out of the landlord's way and no action of his can erect it again as a barrier, unless the Act itself has so provided. The correct principle applicable in such cases was laid down by Gentle J., in the case of *Kanto Mohan Mullick* v. *Jyotish Chandra Mukherjee* (1), with which I respectfully agree.

For the reasons given above, the appeal is dismissed with costs.

Lahiri, J.:—I agree.

A. K. Ghose: Solicitor for the Appellant.

N. C. Boral & Pyne: Solicitors for the Respondent.

B.N.B. *Appeal dismissed.*

(1) (1945) 49 C.W.N. 433.

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CIVIL REVISION.

Before Mr. Justice S. K. Sen.

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May 24.

RANADA RANJAN SAHA

v.

SM. PARUL BALA DEBI.*

Revision Under Section 32(4) of West Bengal Premises Rent Control Act—Fixation of Standard Rent Under Section 9(1) (f) of the said Act—Standard Rent, if can be deduced from Municipal Valuation.

The tenant petitioner applied to the Rent Controller for fixation of standard rent, alleging that the standard rent should be fixed at Rs. 14/- p.m. The application was opposed by the landlord opposite party who contended that the standard rent should be fixed at Rs. 39/10/- p.m. The Munsif acting as rent controller fixed the standard rent at Rs. 30-4-0 p.m. There was an appeal by the landlord to the District Judge. In appeal the District Judge raised the standard rent to Rs. 35/8/-. He did so on the Municipal valuation of the premises. In this application for revision preferred by the tenant Under Section 32(4) of West Bengal Premises Rent Control Act, 1950, against the decision of the District Judge it is urged on behalf of the tenant that the District Judge has overlooked that the Municipal valuation was for the whole of the premises whereas the tenant was in occupation only of a portion thereof. There being no evidence on the record to show what proportion the portion in the tenant's occupation bears to the whole of the premises, the case was sent back to the District Judge for disposal on proper materials.

It was pointed out by his Lordship that the premises being a new building constructed after December, 1949, the case should come under Section 9(1) (f) of West Bengal Premises Rent Control Act, 1950. It was further pointed out that the Municipal valuation is made on the basis of actual rent exclusive of Municipal Taxes, at 5 per cent of the total cost of construction and the value of the land, whereas Under Section 9(1) (f) of West Bengal Premises Rent Control Act, 1950, the landlord is entitled to have rent assessed at 6 per cent of the total cost of construction and the value of the land, the 6 per cent including the occupier's share of taxes, that, therefore, rent could be deduced from Municipal valuation by adding one-fifth of the value thereto.

* Civil Revision Case No. 1864 of 1953, against the decision dated 27-5-53 of the District Judge of the Court of Burdwan in Miscellaneous Appeal No. 98 of 1952 against the decision dated 17-11-52 of the Munsif (House Rent Controller, Burdwan) in H.R.C. (Miscellaneous) Case No. 22 of 1952.

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Ranada Ranjan Saha v. Sm. Parul Bala Debi.

S. K. Sen, J.

The Application was an application for revision under Section 32(4) of West Bengal Premises Rent Control Act arising out of an application for fixing standard rent.

The material facts will appear from the judgment.

Panchanan Pal for the Petitioner.

Ranjit Kumar Banerjee and Anil Kumar Sett and Bimal Krishna Banerjee for the Opposite Party.

The Judgment of the Court was as follows:—

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S. K. Sen, J.:—This is a revisional application under Section 32(4) of the West Bengal Premises Rent Control Act, 1950. The premises in question is a new building constructed after December, 1949, in a part of Burdwan town. The tenant who is the Petitioner before this Court applied before the Rent Controller of Burdwan for settlement of rent on the allegation that the rent agreed for the premises in question was Rs. 20/-, but according to the accommodation provided and the advantages offered by the premises the proper rent should be Rs. 14/-. The application was opposed by the opposite party landlord who contended that the agreed rent was Rs. 33/8/- and further that the tenant had agreed to pay the Municipal taxes when assessed and that the Municipal taxes had been assessed at Rs. 6/2/- per month and the tenant was, therefore, liable to pay Rs. 39/10/- per month and his petition should, accordingly, be dismissed or in the alternative, the standard rent should be fixed Rs. 39/10/-. The learned Munsif of Burdwan acting as Rent Controller correctly held that the case should come under Section 9(1) (f) of the Rent Control Act, 1950. He considered the rival estimates as to the valuation of the premises. He rejected the estimate of Rs. 3,000/- and odd given by the tenant as obviously too low. As regards the landlord's estimate of Rs. 6,945/- for this building alone not including the value of the land, the learned Rent Controller rejected that as too high. The learned Rent Controller took 75 per cent of the landlord's estimate of the building cost plus Rs. 800/- as the value of the land. Thus he assessed the value of the premises including the land at Rs. 6,045/- and calculating 6 per cent therefore as required

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under Section 9(1) (f) he arrived at the rent of Rs. 30/4/- which he declared as Standard rent.

There was an appeal by the landlord , the tenant having apparently accepted the standard rent as fixed by the Rent Controller. The learned District Judge who heard the appeal raised the Standard rent to Rs. 35/8/-. He did so on the Municipal valuation of the premises observing that this was an independent valuation and could safely be accepted. According to him the Municipal Annual valuation was Rs. 426/-; and dividing the same by 12 he arrived at the monthly rent of Rs. 35/8/-. The tenant has preferred this revisional application and it is urged on behalf of the petitioner that there was a failure of justice because the learned District Judge overlooked the fact that the Municipal valuation was for the whole of premises No. 72, whereas the tenant was in occupation of the eastern half thereof.

Having looked into the papers I must agree that the learned District Judge committed a mistake. The estimates, Exts. A and B proved by the landlord clearly show that in the same plot of land two buildings have been erected separated by a partition wall. The two buildings have a common ring well and a common latrine, but the buildings themselves are independent and the eastern building is in the petitioner's possession. The entire premises are Municipal holding No. 72. The annual value is not Rs. 426/- as noted by the learned District Judge, but Rs. 582/-. It appears from Ext. C that the original valuation was Rs. 156/- and this was increased to Rs. 582/- apparently after the construction of the pucca buildings on the land. The difference is Rs. 426/- which is the figure taken by the learned District Judge, but this difference represents the value of the pucca buildings and not the value of the premises as a whole.

If there were evidence that the two buildings are of the same size and of the same value, half of the annual value as shown by Ext. C might be taken as the correct annual value of the premises in occupation of the petitioner tenant. There is, however, no evidence that the two buildings and the two portions of land are quite equal. Accordingly, the case must go back to the learned District Judge for disposal on proper material. I would further point out that the Municipal valuation is made

on the basis of actual rent exclusive of the Municipal taxes or at 5 per cent of the total cost of construction including the value of the land, where as under Section 9(1) (f) of the Rent Control Act, 1950 for new buildings constructed after December 1949, the landlord is entitled to assess rent at 6 per cent of the total cost including the value of the land. But this 6 per cent includes the occupier's share of the taxes. Accordingly, if the rent could be deduced from the Municipal valuation, we would have to add one-fifth of the value in order to obtain rent at 6 per cent. In the absence of evidence, however, as to the relative costs of the eastern building and the western building of holding No. 72 of the Burdwan Municipality the case must go back to the learned District Judge. The parties have agreed in this Court that a competent engineer shall be appointed by the learned District Judge in order to assess the correct valuation of the premises in question and the learned District Judge will do so on such an application being made before him. There after, he should fix the rent in accordance with the provisions of Section 9(1) (f) of the Rent Control Act. The rent assessed should in no case be less than Rs. 30/4/- which was the amount assessed by the learned Rent Controller and against which the tenant had no grievance.

This Rule is, therefore, made absolute and the case remanded to the learned District Judge, Burdwan for disposal in accordance with the directions given above.

The parties will bear their own costs in this Court.

P.K.D. *Rule made absolute.*

APPEAL FROM ORIGINAL CIVIL.

Before Mr. P. B. Chakravartti, Chief Justice and Mr. Justice Lahiri.

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BHARAT CONSTRUCTION CO. LTD.
v.
UNION OF INDIA.*

Indian Arbitration Act, Section 8(1) Clause (b), whether applies when a named arbitrator is unavailable—Test of applicability of the Section—when a vacancy can be supplied—Court's inherent or absolute power to appoint arbitrators—When Court can exercise discretion under Section 34 of the Arbitration Act.

Clause (b) of Section 8(1) of the Arbitration Act does not apply to a case where a named arbitrator, obviously chosen for the possession of qualifications special to him, has become unavailable or refuses to act

Whether or not the said section would apply in a particular case, must be determined by the test laid down in the section itself. The test is that the arbitration agreement must show that it was intended that the vacancy should not be supplied. In other words, however individual the original choice may appear to be, if the agreement itself contains sufficient indication that the parties nevertheless intended that, in defaults of their original nominee, they would be prepared to fill up the vacancy by choosing another arbitrator, the section will apply and a new appointment may be made either by the parties or by the Court, as the case may be. It is now well settled that the Court has no inherent or absolute power to appoint arbitrators and that its powers are only those which are expressly specified in the Act. The power of the Court under Section 8(1) (b) is only discretionary.

'A' brought a suit for recovery of certain sum against 'B' and prayed for a decree for that sum. 'B' made an application under Section 34 of the Indian Arbitration Act for a stay of the suit on the ground that the subject-matter of the suit was covered by the arbitration agreement. The agreement *inter alia* was that all other disputes and differences, the settlement of which is not provided for under any other clause . . . . . shall be referred to the sole arbitration of Major General I/C Administration, Eastern Command, whose decision shall be final etc. At the date of the suit the post and/or office of the "Major General I/C, Administration, Eastern Command" had been abolished and there was no such office then in existence and there has been no such officer since prior to the date of the suit: *Held*, on the true construction of the arbitration clause that the

* Appeal from Original Order No. 123 of 1953 against an order of S R Das Gupta, J. dated 16th February, 1953 in Award No. 215 of 1952.

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arbitrator contemplated was not merely the Officer-in-charge of the Administration, Eastern Command, irrespective of whether he was a Major General or not. That is to say, the arbitrator should not only be the Officer-in-charge of the Administration, Eastern Command, but should also be a Major General in Rank : *Held further*, that the case is not one where the Court ought, in the right exercise of its discretion under section 34, direct the suit to be stayed.

The material facts will appear from the judgement.

A. N. *Ray and* S. C. *Sen* for the Appellants.

G. P. *Kar* for the respondent.

The judgment of the Court was as follows :—

July, 7.

P. B. CHAKRAVARTTI C. J. :—The Bharat Construction Co. Ltd., now in liquidation, have appealed against an order of S. R. Das Gupta J., dated the 16th February, 1953, by which the learned Judge stayed a suit brought by them in exercise of his powers under section 34 of the Indian Arbitration Act. The stay was resisted on the ground that the arbitration agreement upon which the ground that relying had become infructuous in as much as no arbitrator, answering the description given in the agreement, was or could any longer be available. That argument did not appeal to the learned Judge who rejected it and ordered a stay of the suit.

The facts are simple. It appears that in 1944, the then Government of India called for tenders for the construction of certain structures intended for military purposes and a tender was submitted by the appellants on the 26th April, 1944, and accepted on the 12th of May following. The work was to be carried out in accordance with the terms and conditions of Contract Form No. I. A .F. W.-2159 and the amendments thereto, including the schedules, specifications and plans contained in and attached to the form. Clause 35 of the contract provided for the decision of disputes and it was

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divided into two paragraphs. The first paragraph was concerned with questions relating to the meaning of specifications, drawings and instructions contained in the contract and to the quality of workmanship or materials used on the work. As regards such question, the "C.R.E.U.S. Works" were to be the sole deciding authority. The second paragraph, which has given rise to the question involved in this appeal, was in the following terms :—

> "All other disputes and differences the settlement of which is not provided for under any other clause of this Contract and which shall arise either during the progress of the work or after completion thereof concerning the work or the execution or maintenance thereof or the construction or meaning of these conditions of contract or as to any other matter arising out of or relating to the contract or the work to be executed or payments to be made in pursuance thereof shall be referred to the sole arbitration of Major General I/C, Administration, Eastern Command whose decision shall be final, conclusive and binding on all parties to the contract."

It should be noted here that the standard form does not name the deciding authority in paragraph 1 or the arbitrator in paragraph 2, but contains blank spaces for the insertion of relevant names in accordance with certain instructions given in the margin. The names inserted in the present case were "the C.R.E.U.S. Works" and "Major General I/C, Administration, Eastern Command" respectively, which does not appear to have been in accordance with the instructions contained in the printed form.

It is not disputed that work under the contract was done. According to the respondent, upon whom the rights and liabilities of the old Government of India under the contract have admittedly devolved, the appellants were fully paid off. According to the appellants, some of the bills are still outstanding.

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On the 16th May, 1952, the appellants brought a suit on the Original Side of this Court for the recovery of a sum of Rs. 52,665-7-0 said to be still due to them on account of work done under the contract. They alleged that they had received payment from the old Government of India against their bills from time to time, but a sum of Rs. 39,156-11-0 had remained unpaid, which, together with interest, had amounted up to Rs. 59,665-7-0. Accordingly, they asked for a decree for that sum, either as a contractual debt or as compensation for work done under the contract, of which the old Government of India had enjoyed the benefit.

Thereafter, on the 4th August, 1952, the respondent made an application under section 34 of the Indian Arbitration Act for a stay of the suit on the ground that the subject-matter of the suit was covered by the arbitration agreement. The reply of the appellant was that the arbitration agreement had become infructuous and inoperative, inasmuch as the parties had agreed and intended to refer matters in dispute between them to the sole arbitration of "Major General I/C, Administration, Eastern Command" and to no other person. "The Post and/or Office of the Major General I/C, Administration, Eastern Command," they pleaded, "has been abolished and there is no such Officer at present in existence and there has been no such Officer since about 1947." They added that it was not the intention of the parties that any vacancy in the office of the Administrator was to be filled up by either the parties or the Court and that, therefore, the arbitration clause had become infructuous and inoperative. The respondent's rejoinder was that the parties had agreed and intended to refer matters in dispute between them to the arbitration of the Officer-in-Charge of the Administration, Eastern Command, and that it was wholly immaterial whether the said Officer held the rank of a Major General or not. "The officer in charge of Administration of Eastern Command," the respondent pleaded, "is a Brigadier in rank," and further, "instead of a Major General the post is being held by a Brigadier." On the above basis, it was denied that the

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arbitration clause had become infructuous or inoperative, but then followed a somewhat curious averment in the following terms: "I deny that it was not the intention of the parties that the vacancy, even if it had occurred in the office of the arbitratior, was not to be filled up or that it was ever the intention that the arbitrator should be any person other than a Major General."

If the above averment be taken to mean what it says, it is clearly a complete negation of the case which the respondent wanted the Court to consider. The first part of the averment denies that it was not the intention of the parties that a vacancy in the office of the arbitrator was not to be filled up and, therefore, it asserts that the filling up of a vacancy was never intended. Similarly, the second part of the averment denies that it was ever the intention of the parties that the arbitrator should be anyone other then a Major General and, therefore, it asserts that only a Major General and no person holding any other rank was intended by the parties to be the arbitrator. It was, however, stated before us that the sentence I have extracted above did not convey the real meaning of the respondent and that confusion had been caused by an error of draftsmanship. It is not very usual to come across draftsmanship of that character in a pleading filed on behalf of the State, but I am prepared to accept the respondent's contention and hold that the sentence concerned only represents the inability of the draftsman to cope with double or rather treble negative.

The main question to be decided, therefore, was what the arbitration agreement really contemplated whether it meant that the arbitrator would have to possess the twin qualifications of being the Officer in charge of the Administration, Eastern Command, and holding the rank of a Major General or whether the only essential requisite was that he should be the Officer in charge of the Administration, Eastern Command. S. R. Das Gupta, J held that the arbitration

clause attached to the office and not to the particular person who held it. According to him, it was the Officer in charge of the Administration, Eastern Command, who was intended to be the arbitrator, whether he was a Major General or a Brigadier and he consequently held that there was an effective arbitration still subsisting. In the result, an order for stay was made and, as I have already stated, the present appeal is directed against that order.

On behalf of the appellants, Mr. Ray wanted to canvas before us two points. He contended, in the first place, that the application of the respondent was liable to be thrown out at sight, inasmuch as it was not a proper application under section 34 at all and did not make out any case for a stay. In the second place, he contended that the only arbitrator contemplated by the arbitration clause was a Major General in Charge of the Administration, Eastern Command, and that the learned Judge had erred in taking the view that any officer holding the charge of the Administration, Eastern Command, would be a competent arbitrator under the agreement, irrespective of the rank he held in the army.

In my view, it is not open to Mr. Ray's clients to raise the first question for the first time in appeal. There is no trace of it in their affidavit-in-opposition and the point was not even mentioned in the trial Court. I am prepared to concede that if the appellants could be allowed to raise the question, the respondent would have had a difficult point to meet, because the purported application under section 34 does not make out that a dispute, as understood in the law of arbitration, had arisen before the institution of the suit or before the filing of the application, that such dispute was the subject-matter of the suit and that the dispute was within the second paragraph of clause 35 of the contract. It is, however unnecessary for me to enlarge on the defects of the application, inasmuch as the pleadings have got to be scanned with extreme rigour in cases under the Arbitration Act and no party can be allowed to raise a point, if he has not given

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sufficient notice of it, in his affidavits. If the respondent did not make appropriate averments, required for supporting an application under section 34, with sufficient particularity, so did the appellants not raise and objection in their affidavit-in-opposition. In the circumstances, the first point sought to be raised by Mr. Ray cannot be entertained.

On the true construction of the arbitration clause, however. I feel constrained, with great respect to the learned trial Judge, to express my dissent from him If all that the parties intended was that the arbitrator would have to be the Officer in charge of the Administration. Eastern Command, the use of that description or designation would be sufficient to convey their meaning and it would not have been necessary to add the expression "Major General." Mr. Kar, who appeared on behalf of the respondent, contended that the expression "Major General" was a surplusage and had came to occur in the contract probably for the reason that the Officer, actually in charge of the Administration Eastern Command at the time of the contract, happened to be a Major General There is no evidence that a Major General was then in charge of the Administration ; but one may presume that it was so, since otherwise the position would be that the parties entered into an arbitration agreement which was ineffective at its very inception. Even so, however, I am unable to agree that the use of the expression, "Major General," was a mere surplusage. As I have pointed out already, the contract was in accordance with a standard from. Any adapatations made of it, for the purpose of a particular contract, must have been deliberately made and if a good and intelligible reason can be found for the use of a certain expression, it will not be right to discard that expression as a surplusage, instead of giving it was meaning which it may appropriately bear in the context of the facts. In my view, a good and intelligible reason can be seen for the insertion of the words, "Major General." It is to be noticed that the arbitrator was to be an employee of the respondent and it is not making a voilent presumption to think that the parties must have intended that the arbitrator should be a person of a status, sufficient to

enable him to give a decision against his employer, if necessary, and a person possessed of a sufficient sense of responsibility and maturity of judgment. If the construction contended for by the respondent be accepted, the result would be that if in course of time the duties of the Officer in charge of the Administration, Eastern Command, came to be of relatively small importance, for example, if they were reduced to mere supervision of the disposal of surplus war materials or some such duty or duties, and if a raw sublatern was placed in charge of the office, even he would be a competent arbitrator within the meaning of an arbitration clause. I am entirely unable to hold that such could have been the intention of the parties. To my mind, they must have attached and did attached some importance to the status of the arbitrator and they chose a Major General, because a person holding that rank in the army would necessarily be a man of a mature age, a developed judgment and a stature sufficient to enable him to decide rightly without hesitation, even if he were to decide against his employer. I cannot, therefore, agree that the arbitrator contemplated by the arbitration clause was merely the Officer in charge of the Administration, Eastern Command, irrespective of whether he was a Major General or not

It would appear that the respondent itself took that view at the stage of the correspondence which preceded the institution of the suit. On the 23rd November, an officer of the Eastern Command, apparently speaking on behalf of the Government, stated as follows :—

"In view of the fact that the Arbitrator Originally mentioned in the contract is a high ranking Military Officer, the Department is prepared to refer the matter to the Arbitration of his successor i.e. Brig. I/C, Admn. or another high ranking Military Officer."

It is perfectly clear that, in the above passage, the writer was not taking the view that the old arbitration clause was still subsisting and that accordingly to its terms, who ever was the officer in charge of the Administration, Eastern

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Command, would be entitled to function as the arbitrator. On the other hand, the writer was saying that the Department was prepared to refer the matter to the arbitration of the Successor of the Major General or "another high ranking Military Officer," which means that the Department was prepared to enter into a fresh agreement for a reference to another arbitrator, freshly chosen. There could be no question of making a reference to "another high ranking Military Officer" under the original arbitration clause. It is also noticeable that the reason why the Department was proposing to make a reference to a Brigadier or to another high ranking Military Officer was that the arbitrator originally mentioned in the contract was a high ranking Military Officer. In my view, the respondent or those who were speaking on its behalf were there admitting that the use of the expression. "Major General," in the arbitration agreement was not purposeless and that it was really intended to particularise an arbitrator by reference to a particular rank held by him. They were also admitting that when a Major General was no longer available, as had in fact happened, a case would arise for a reference to a Brigadier or another high ranking Military Officer and, therefore, they were not insisting that no question of making a reference under any fresh agreement could arise, inasmuch as the original agreement was subsisting and under its provisions the arbitrator would now be the Brigadier, in charge of the Administration, who had succeeded the Major General.

I may also point out that the expression, "Major General," is not the designation for an office like 'Commandant' or 'Quarter Master General' or 'Superintendent.' It is a designation not describing the holder of a post, but describing the personal rank of the Officer to whom it is applied. The instruction given in the margin of the standard form say that in the case of contracts accepted by the Garrision Engineer, the space left blank for the insertion of the name of the arbitrator should be filled in by entering the expression, "Assistant Adjutant and Quarter Master General" and that in the case of contracts accepted by the Commander, Royal Engineers, or the Chief

Engineer, the entry should be, "Deputy Aujutant and Quarter Master General of the Command." Those are designations of offices and not of the personal rank held by particular Officers. To my mind, the fact that in the face of those instructions, the entry made in the arbitration clause in the present case was not the designation of any office, but the designation of a personal rank, makes it abundantly clear that the individuality, the personality and the special qualifications or a particular Officer of a particular rank were determining factors in the choice of the arbitrator. This is another circumstances which points to the true meaning of the arbitration clause.

The respondent might, if it had wished, give the court adequate information as to what the expression "Major General i-C. Administration, Eastern Command" really meant in military terminology. It was not suggested to us that the whole expression was the designation of a particular office, irrespective of the rank of the holder and in these circumstances, we must accept what appears to us to be the natural meaning of the expression. If that meaning be taken, it must be held that the expression, "Major General," cannot be ignored and that what the parties intended was that the arbitrator should not only be the Officer in charge of the Administration, Eastern Command, but should also be a Major General in rank.

On behalf of the respondent, Mr. Kar drew our attention in the case of *Ramayan Singh* v. *Dominion of India* (1). It is true that an arbitration clause, expressed in identical terms, fell to be construed in tha case, but I am unable to see that the decision throws any light on the question now before us. What appears to have been pleaded in that case was that the Eastern Command itself had been abolished and Sinha, J. held that the Command had not been abolished but was "very much in existance" and that, therefore, the post of "Major General in charge, Administration, Eastern Command," had also not ceased to exist. The question that although the Eastern Command itself had not ceased to exist, the Officer in charge of its Administration branch was no longer a Major General but a Brigadier and therefore the arbitration clause had become infructuous,

(1) In the matter of Arbitration Act, 1940 and in the matter of Suit No. 3611 of 1948 decided by S. B. Sinha, J., dated 11th day of July, 1949—unreported.

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was neither raised before the learned Judge, nor decided by him. The case, therefore, is of no assistance on the present question of construction.

As I have already stated, the contention of the appellants was that since there was no operative arbitration clause existing, there could be no question of any reference to arbitration and, therefore, no question of a stay of the suit. Mr. Kar, however, contended that even assuming that the construction put by him upon the arbitration clause was erroneous and that the arbitrator contemplated by the agreement was no longer available, the agreement had still not become infructuous, in asmuch as the parties could choose another arbitrator under the procedure laid down in section 8 of the Arbitration Act or in default of an appointment by them, the Court could appoint an arbitrator under the provisions of the same section. In my opinion, this contention also cannot be accepted.

The only relevant clause of section 8 of the Act is clause (b) which reads as follows:

> "If any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy."

The section goes on to say that in such a contingency and certain other contingencies, any party may serve the other parties or the arbitratotrs, as the case may be, with a written notice to concur in the appointment or in supplying the vacancy, and that if no appointment is made within fifteen days after the service of such notice, the Court may, on the application of the party who gave the notice, appoint an arbitrator or arbitrators.

It is at least doubtful whether clause (b) of section 8 (1) of the Arbitration Act at all applies to a case where a named arbitrator, obviously chosen for the possession of qualifications special to him, has become unavailable or refuses to act. It

would seem that, normally, the parties would in such a case desire and agree to have the matters in dispute between them settled by arbitration, only if the arbitrator was the particular person chosen by them. It was, however, pointed out by Mr. Kar that the section spoke of "any appointed arbitrator" and that that expression obviously included an arbitrator specified by his personal name. Mr. Kar's contention was that if the section applied to a case where the arbitrator originally chosen by the parties was a particular individual, there was no reason why it should not apply to a case where the arbitrator originally chosen was person possessed of an specified by certain qualifications. It must be conceded that there is great force in that argument and it appears to me that whether or not the section would apply in a particular case, must be determined by the test laid down in the section itself. The test is that the arbitration agreement must now show that it was intended that the vacancy should not be supplied. In other words, however individual the original choice may appear to be, if the agreement itself contains sufficient indication that the parties nevertheless intended that, in default of their original nominee, they would be prepared to fill up the vacancy by chosing another arbitrator, the section will apply and a new appointment may be made either by the parties or by the Court, as the case may be. It must, therefore, be seen whethere there is any indication the present case that the parties intended that the vacancy should be supplied, if the Arbitrator, originally named by them, ceased to be available for one or another of the reasons mentioned in the section or, to put it in the language of the section itself, whether the agreement does not show that it was intended that the vacancy should not be supplied.

I do not find any indication in the agreement in the present case of any intention that a vacancy arising in the office of the arbitrator should be supplied by the appointment of another person. It should be remembered, however, that under the provisions of the agreement, no vacancy would arise, simply because the particular Major General who was holding the office at the time of the contract ceased to hold that office, if he was succeeded by a successor who was also a Major General. So long as the Major General was succeeded by a Major General in the particular office and so long as the course of such succession was not

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broken by the introduction of an Officer holding a different rank, no vacancy in the office of the arbitrator would arise at all. A vacancy would arise only when the Officer in charge of the Administration, Eastern Command, was no longer a person, holding the rank of a Major-General. Does the agreement contain any indication that even in such an event, the agreement would continue to subsist and that the office of arbitrator could be filled by the appointment of either the successor of the Major General or any other officer? I can find no such indication. Ordinarily, when an arbitrator is chosen by name and some reference is made to his office, it is usual to find a provision to the effect that in the event of the particular arbitrator dying or ceasing to hold the particular office, another arbitrator would be appointed. If the arbitration agreement in the present case contained a provision to the effect that in the event of the office ceasing to be held by a Major General, the parties would choose another arbitrator, it might be said that there was an intention that a vacancy occurring in the office would be supplied. As the agreement stands, however, there is only a single provision of an absolute character with no indication or suggestion of any alternative, either express or implied. I am, therefore, of opinion that the present agreement is one which does show that it was intended that the vacancy, if any occurred, should not be supplied.

But assuming that I am wrong in that construction of the arbitration clause and that the agreement does not contain an indication that the parties intended vacancies in the office to be supplied the provisions of section 8(1) of the Act seem to me to be still inapplicable to the case. It is now well settled that the Court has no inherent or absolute power to appoint arbitrators and that its powers are only those which are expressly specified in the Act. See the case of *In re: Smith & Service and Nelson & Sons* (1). On a reference to the opening words of clause (b) of section 8(1), it will be found that the section contemplates a number of contingencies, none of which is present in the instant case. The first contigency is: "If any appointed arbitrator neglects or refuses to act." No Major General in charge of the

(1) (1890) 25 Q.B.D. 545.

Administration, Eastern Command, has neglected or refused to act in the present case. The next contigency is: "or is incapable of acting." No appointed arbitrator, that is to say, no Major General in charge of the Administration, Eastern Command, has become incapable of acting, while still holding the post. There is no such Major General holding such post now at all. The third alternative is: "or dies." Happily, no Major General in charge of Administration, Eastern Command, has died. These three contingencies exhaust the list contained in clause (b) of section 8(1) and since the present case does not come under any of them, it is clear that the section is not applicable, although the arbitration agreement may not exclude an intention to fill up a vacancy, if one should arise. Mr. Kar was not slow to see the difficulty in his way and was constrained to contend that the present case must be taken to be a case of a death of the appointed arbitrator. His submission was that the last Major General who was in charge of the Administration, Eastern Command, must be taken to have suffered a figurative death when he relinquished the office and therefore, since he was not succeeded by a Major General, a vacancy had arisen which the Court might step in to fill under the provisions of section 8(1) (b) and under the authority of the phrase "or dies." To my mind, the suggestion made by Mr. Kar is plainly a fanciful one and should not be accepted.

The unreported decision of Sinha, J. was cited by the respondent in support of its case on this point as well. After holding that the Eastern Command had not, in fact, been abolished and therefore the post of 'Major General in Charge, Administration, Eastern Command; was still subsisting, Singha, J., proceeded to say that even if he held that a vacancy had arisen, he would have held that the vacancy could be supplied. "If therefore," observed the learned Judge, "there is no arbitrator available, the Court, I think, is entitled to appoint an arbitrator under section 8 of the Indian Arbitration Act." With great respect to the learned Judge, I am unable to agree with him for the reason which I have already given.

Assuming further that not only am I wrong in my construction of the arbitration clause, but I am also wrong in my construction of section 8(1) (b) in its application to the present case, I would still not be prepared to uphold the order for stay in view of the circumstances of the case. At best, the power of the

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Court under section 8(1) (b) is only discretionary. It used to be thought at one time that the decision in In re: *Ryre and Corporation of Leceister* (1), had laid down that the word "may" in the corresponding section of the English Act meant "must," but the true effect of the decision has since been explained in the subsequent case of *In re: Bjornstad and another The Ouse Shipping Company, Limited* (2). There it has been held, what in fact the section itself says in plain terms, that in the matter of making an appointment in a vacancy created by the failure of the parties to appoint an arbitrator, the Court has always a discretion. Will it be right in the present case to order a stay of the suit in the expectation that the parties may, by exchanging nominations between themselves yet appoint an agreed arbitrator or that in default of their doing so, the Court may appoint one? I am not prepared to say that it will be right to adopt that course. The Correspondence which has been exhibited in the case makes it plain beyond doubt that there is no chance whatever of the parties coming to any kind of agreement. What remains therefore is the uncertain prospect of the Court making an appointment at some date or other. I do not think that in view of the nature of the arbitration clause and the situation which has arisen, it will be right to prevent the court from exercising its normal jurisdiction and consign the dispute to the decision of an arbitrator who may or may not be appointed and, if appointed, may not be appointed within a reasonable time. On behalf of the respondent, our attention was drawn to a decision of S. R. Das, J. when a Judge of this Court, given in case of *Subal Chandra Bhur v. Khan Br. Md. Ibrahim* (3). The case was cited by Mr. Kar as if it supported him. In fact, however, the opinion expressed by that very eminent Judge points to an opposite direction. Section 8 of the Act did not apply in the case before him, because there was no agreement to refer dispute to a single arbitrator *simpliciter*, but only an agreement for a reference to a single arbitrator with an alternative for a reference to two. Section 8 being thus out of the way, the learned Judge still applied his mind to the question as to whether the fact that an arbitration might prove infructuous should influence his decision against directing a stay. The difficulty in that case was that, according to the arbitration agree-

(1) (1952) 1 Q.B.D. 186.
(2) (1914) 2 Q.B. 678.
(3) (1948) 47 C.W.N. 570.

ment, if the parties could not agree to the appointment of a single arbitrator, there would be two arbitrators, one to be appointed by each party to the difference. The parties were partners of a firm who were three in number and, quite obviously, the arbitration agreement provided for the choice of two arbitrators by three parties, each choosing one. The agreement was thus plainly unworkable or would almost certainly prove to be so, unless two of the partners combined to nominate the same arbitrator. S. R. Das, J. recalled that the possibility of the arbitration proving infructuous had not prevented the Bombay High Court from directing a stay in the case of *In re*: *Babaldas Khemchan* (1), but he considered it necessary to say that such a posibility should not be altogether overlooked in determining whether there was any sufficient reason why the matters in dispute should not be referred to arbitration. The inclination of his opinion is therefore obvious. Earlier in the judgment, his Lordship observed that he had doubts whether, in such circumstances and in the exercise of his discretion, he should stay the suit and drive the parties to an arbitration which would inevitably be infructuous. The case, therefore, is a strong authority for holding that where an arbitration is beset with difficulties and might never be possible, the court should incline infavour of allowing the suit to continue and against staying it.

In all the circumstances of the case, it appears to me that the present case is not one where an order under Section 34 can be made or, in any event, the case is not one where the Court ought, in the right exercise of its discretion under Section 34, direct the suit to be stayed.

In the result, this appeal is allowed, the order of the learned Judge directing stay of the suit is set aside and parties are directed to proceed with the suit. In view of the difficulty and the comparative novelty of the point, there will be no order for costs, either before us or in the Court below.

A. P. Roy & Co.: Solicitors for the Appellants.

S. K. Mondal: Solicitor for the Respondent.

Lahiri, J.:—I agree.

B.N.B. *Appeal allowed.*

(1) (1919) I.L.R. 45 Bom. 1.

ORIGINAL CIVIL.

CIVIL.

1954.

December, 6.

Before Mr. Justice R. S. Bachawat.

MAHALUXMI BANK LIMITED

v.

CHOTONAGPORE INDUSTRIAL AND COMMERCIAL ASSOCIATION.*

Jurisdiction—Overdraft by a Bank at its Branch—Application of the principle that debtor must find out its creditor.

Held—(i) The place of residence of the creditor on the date of institution of the suit cannot be regarded as the place for payment where some other place for payment is fixed by contract either expressly or by implication.

(ii) The Court cannot blindly apply the general rule and ignore the just implication to be drawn from the proved facts and the circumstances of the case.

(iii) In the case of current account it is well settled that the obligation of the banker to repay arises on demand and is limited to the office where the account is kept.

(iv) Though a loan by a bank on an overdraft account is repayable without demand, the loan is repayable at the office where the overdraft account is being maintained and the said account can be ascertained. The bank is under no obligation to accept payment at any office other than the office where the overdraft account is kept and to which the payment is to be credited The branch offices are agencies of one and the same bank, they are distinct trading bodies for certain purposes.

The material facts will appear from the judgment.

A. K. Sen, (Jr.) for the Plaintiff.

S. S. Mukherjee for the Defendant.

The judgment of the Court was as follows:—

R. S. Bachawat, J.:—This is a suit for recovery of the monies due to the plaintiff bank in respect of an overdraft account which the defendant had with the Ranchi Branch of the plaintiff bank. The defendant executed in favour of the plaintiff

* Original Side Suit No. 1996 of 1951.

bank a promissory note dated August 14, 1948 and a letter of lieu by way of security. In or about the month of October, 1949, the Ranchi Branch of the plaintiff bank was closed and the books and papers of that branch of the plaintiff bank were transferred to its Head Office at No. 135, Canning Street, Calcutta.

By letter dated February 20, 1951, sent from Calcutta, Mr. H. N. Sen, Attorney for the plaintiff bank demanded from the defendant repayment of the said loan either to the plaintiff bank or to him as its attorney.

By its reply dated February 26, 1951, the defendant repudiated the claim entirely.

The suit was instituted on May 9, 1951.

By consent, the issue as to jurisdiction was tried as a preliminary issue.

Before the overdraft account was opened, the defendant applied to the Ranchi Office of the plaintiff bank for the grant of overdraft facilities. I am not satisfied that the application was addressed to the Head Office. The original application has not been produced. I am not also satisfied that Mr. D. P. Sen Gupta, a director of the defendant came to the Head Office or that he procured the sanction for overdraft by the Head Office at Calcutta. This case was not made by the plaintiff bank on the first day of the trial. There is evidence to show that the Ranchi branch obtained sanction of the Head Office for the grant of overdraft facilities to the defendant. The defendant had nothing to do with this sanction which was purely a matter of internal arrangement between the Ranchi branch and the Head Office. Both the offer and acceptance relating to the overdraft were made at Ranchi. The inter-departmental sanction of the overdraft by the Head Office at Calcutta is not part of the cause of action.

The plaintiff's counsel contends that the defendant must seek its creditor and pay the plaintiff at its Registered Office at Calcutta and therefore, the Court has jurisdiction,

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Mahaluxmi Bank, Limited. v. Chotonagpur Industrial & Commercial Association.

R. S. Bachawat, J

In re: *Elder* (1), Brown, L.J. stated:

"The general rule is that where no place of payment is specified, either expressly, or by implication, the debtor must seek his creditor. In *Haldane* v. *Johnson* (2), it was held that a covenant for payment of rent where no particular place of payment is mentioned, is analogous to a covenant to pay a sum of money in gross on a day certain, in which case it is incumbent upon the covenantor to seek out the person to be paid and pay or tender him the money."

This rule should be applied with caution in this country. see *Ramalinga Aiyar* v. *Jayalakshmi* (3).

The obligation to pay involves the obligation to find the creditor and to pay him at the place where he is when the money is payable where no other place for payment is fixed by the contract either expressly or implication.

Thus in the absence of an express or implied term to the contrary the prompt dower ought to be paid to the wife at the place she resides when the dower is demanded *Tasilman Bibi* v. *Abdul Latif Miya* (4), and principal and interest under a debenture ought to be paid at the place where the debenture holder is when the money is payable under the debenture. *Fowler* v. *Midland Electric Corporation* (5). In such cases the application of the general rule is necessary in order to preserve the obligation to pay, because if the debtor is not bound to pay anywhere, the creditor has got a right which can never be enforced, See *Drexel* v. *Drexel* (6).

In *Soniram Jeetmull* v. *R. D. Tata & Co.* (7), the defendant carrying on business in Calcutta undertook to make good and

(1) (1893) Probate Div. 119, 136
(2) (1853) 8 Ex. 689.
(3) (1941) A.I.R. Mad. 695.
(4) (1985) I.L.R. 63 Calc 726
(5) (1917) 1 Ch. 656, 661.
(6) (1916) 1 Ch. 251, 261.
(7) (1927) 54 I.A. 265.

pay to the plaintiff company certain moneys due to the plaintiff in respect of dealings had by the Rangoon Branch of the plaintiff with its constituents in the event of loss due to failure or suspension of payment of the constituents. The Judicial Committee held that by necessary implication of the contract to pay the plaintiff the defendant was under the obligation to pay at Rangoon where the plaintiff had a branch office and was to be found for the purposes of payment. Section 49 of the Contract Act imposes a statutory duty upon the debtor to apply to the creditor at such place where the promise to pay is to be performed without application by the creditor and no place is fixed for payment. In the above case Lord Summer observed that where the debtor has not performed his statutory duty the section does not "get rid of inferences that should justly be drawn from the terms of the contract itself or from the necessities of the case involving in the obligation to pay the creditor the further obligation of finding the creditor so as to pay him." The Judicial Committee held Rangoon to be the place for payment though the creditor had only a branch office at Rangoon.

The place of residence of its creditor on the date of the institution of the suit cannot be regarded as the place for payment where some other place for payment is fixed by the contract either expressly or by implication, see *Sailendra Nath Mukherjee* v. *Ramsundar Ghosh* (1), *Riley* v. *Holland (William) & Sons Ltd.* (2). The Court cannot blindly apply the general rule and ignore the just implications to be drawn from the proved facts and circumstances of the case.

In *Srilal Singhania* v. *Anantlal* (3), when the promissory note was renewed the creditor who had his residence at Bhagalpur lived mostly at Calcutta and he told the debtor that payment might have to be made either at Calcutta or at Bhagalpur or at such other place where he happened to be living. Lort-Williams, J. held that the money was payable on demand and that at the meterial time when the money was payable the creditor was residing at Calcutta and that in the circumstances

(1) (1912) 16 C.L.J. 281.
(2) (1911) 1 K.B. 1028, 1031.
(3) (1940) I.L.R. 1 Calc. 313.

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applying the general rule the place of payment was Calcutta. The facts of that case are entirely distinguishable.

In this case the overdraft account was opened, maintained and operated upon at the defendant's office at Ranchi. The loans were advanced at Ranchi and on the dates of the advances the plaintiff had a branch office and the defendant had its registered office at Ranchi. Each loan was repayable without previous demand as soon as it was made. The obligation to repay was in the eye of the law broken and the cause of action arose instantly on the loan *Norton* v. *Ellam* (1). Quite clearly the appointed place for repayment was Ranchi where the creditor had its branch office and where the overdraft account was maintained. As a matter of fact all repayments were made at Ranchi and were credited to the defendant in its overdraft account at Ranchi.

In the case of current account it is well settled that the obligation of the banker to repay arises on demand and is limited to the Office where the account is kept, see *Clare & Co.* v. *Dresdner Bank* (2), and *Joachinsom* v. *Swise Bank* (3). Though a loan by the bank on an overdraft account is repayable without demand, in my opinion the loan is repayable at the Office where the overdraft account is maintained and the state of accounts can be ascertained. The Bank is under no obligation to accept payment at any office other than the office where the overdraft account is kept and to which the payment is to be credited. It is well settled that though branch offices are agencies of one and the same bank, they are distinct trading bodies for certain purposes. *Rex* v. *Lovitt* (4).

The term as to repayment at Ranchi is implicit in the banking transaction of the loans on the overdraft account. The implication also arises from the course of dealings between the parties.

The application of the general rule to the facts of this case also indicated Ranchi as the place for repayment. In

(1) (1837) 2 M. & W. 461.
(2) (1915) 2 K.B. 576.
(3) (1921) 3 K.B. 110, 126, 129-30.
(4) (1912) A.C. 212, 219.

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applying the general rule regard must be had to the proper place at the time when the money is payable. On the several dates when the loans were repayable the defendant was under an obligation to seek the plaintiff at Ranchi where the plaintiff had its branch office and where the overdraft account was maintainee. The breach of the obligation to repay took place at Ranchi. The subsequent closure of the Ranchi office does not shift the venue of the branch.

I therefore find that by clear implication the place of repayment according to contract is Ranchi and not Calcutta.

In my opinion no part of the cause of action arose within the jurisdiction of this court and accordingly this court has no jurisdiction to try this suit.

The result is to be regretted because a large sum of money is due to the plaintiff and the defendant's counsel in course of the trial admitted that he challenged only a few small items in the accounts.

The plaintiff bank instituted and conducted this suit in this court in good faith though it has been unable to prove its case by reason of the fact that its affairs are at present in great disorder.

The suit is dismissed on the preliminary ground that this court has no jurisdiction to try the suit.

The suit is dismissed with costs.

H. N. Sen: Solicitor for the Plaintiff.

S. C. Roy Choudhury: Solicitor for the Defendant.

S.K.R.C. *Suit dismissed.*

ORIGINAL CIVIL.

Before Mr. Justice P. B. Mukharji.

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1952.

September, 3

PANNALAL PRAMANICK

v.

NARAYAN CHANDRA DUTTA & ORS.*

Mortgage—Suit by a prior mortgagee—Right of puisne mortgage in such suit.

Held—the rights of a puisne mortgagee in a prior mortgagee's suit are (i) the right to redeem the prior mortgage and (ii) the right to participate in surplus sale proceeds. But apart from these rights the puisne mortgagee has no further rights.

Common fairness requires in accordance with equitable principle that before the mortgagor's property is sold he should have the right to redeem. The puisne mortgagee in a prior mortgagee's suit does not give the mortgagor any right to redeem the puisne mortgage. Secondly a puisne mortgagee should not have any right of sale in a prior mortgagee'e suit without redeeming the prior mortgage. Order 34 Rule 5 of the Code as well as in present Form 6 of App D of the Code for final decree of Sale this principle is expressly recognised by stating that the property is being sold not only because the mortgagor has failed to pay but also because the puisne mortgagee has failed to redeem the prior mortgagee.

The material facts will appear from the judgment.

P. P. Ghosh for the Appellant.

G. Mitter for the Respondents.

The judgment of the Court was as follows:—

P. B. Mukharji, J.:—This is an application by a defendant puisne mortgagee in this Suit by the name Sm. Nirmala Sundari Dasi. She asks for an order on this application to be transferred from the category of a defendant to that of the plaintiff in this suit and for consequential amendment of the plaint and she also asks for the reference now pending before the Registrar be proceeded with for sale of the properties. She makes an

* Original Suit No 909 of 1948.

alternative prayer in this notice of motion to be given the liberty to proceed with the reference in this suit for having the properties sold for the satisfaction of her claim on her mortgage in pursuance of the decree made in this suit dated the 20th December, 1949.

The facts may be stated briefly: By an indenture of mortgage dated the 19th May, 1934 the mortgagor defendant mortgaged premises Nos. 86/1 Cornwallis Street, 7/C, Kiriti Mitter Lane, 31/1, Daspara and 31, Golaghat Dum Dum in favour of the applicant. This mortgage in favour of the applicant was subject to a number of prior mortgages. The applicant filed her mortgage suit being suit No. 158 of 1935 and a preliminary mortgage decree was passed in that suit on the 8th March 1935. The Registrar in his report made in that suit on the 23rd August, 1935 reported the amounts due to the applicant.

This suit was filed by a prior mortgagee by the name Panna Lal Pramanick in respect of his mortgage relating to premises No. 7/C, Kirti Mitter Lane, 31, Golaghat and No. 13/1, Das Para. The plaintiff in this suit thereafter applied to this Court for joining the present applicant as a puisne mortgagee as a party to this suit and for final decree for sale of the properties for the benefit of the plaintiff and the other puisne mortgagee defendants in this suit. The final decree for sale was made by consent on the 20th December 1949 in this suit. It was by an order of the 20th December 1949 that the present applicant had been added as a party to this suit and thereafter the aforesaid final decree for sale was made. The relevant provisions in the final decree will have to be noticed for determination of the point raised in this application. But before setting them out I must observe that in the form of the decree it is stated that it was a suit for reopening the mortgage transactions dated the 4th October, 1932 mentioned in the plaint of this suit and the decrees made in suit No. 1094 of 1935 for declaration that the defendant Narayan Chandra Dutt a mortgagee is entitled to Rs. 4,630 under the mortgage dated the 4th October, 1932 and that the said defendant Narayan Chandra Dutt was liable for the refund of the sum of Rs. 3,645/1/5. This decree dated the 20th December, 1949 was a consent decree. Its relevant provisions are:—

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"It is hereby ordered and decreed with the consent of the parties by their respective advocates that the account of the defendant Sm. Nirmala Sundari Dasi in respect of moneys due to her taken by the Registrar of this Court in her suit No. 158 of 1935 be treated as her account in this Suit and it is further ordered and decreed with the like consent that default having been made in payment of the amounts due to the plaintiff and the said defendant Sm. Nirmala Sundari Dasi the said mortgaged properties or a sufficient part thereof be sold but not until the expiry of six months . . . . . And it is hereby further ordered and decreed with the like consent that the money realised by such sale shall save as hereinafter mentioned be paid into Court and shall be duly applied after deduction there from of the commission payable thereon and the expenses of the sale first in payment to the plaintiff of the total amount paid by him to the defendant Narayan Chandra Dutt and then in payment of the total amount due to the plaintiff under the aforesaid decree in respect of her own mortgage . . . . . and that the balance if any shall be applied in payment of the amount due to the said defendant Nirmala Sundari Dasi."

Under this decree the plaintiff in this suit proceeded before the Registrar for the sale of the properties and the applicant also took part in such reference for sale. The sale of the properties was fixed for the 17th May 1952 but the plaintiff on the said date stated that he did not want to have the sale proceeded with as the plaintiff's claim had been satisfied and the plaintiff wanted to have the reference struck off. Upon this the issue has been raised by the present applicant a puisne mortgagee defendant that having regard to the terms of the decree the sale should be proceeded with as the decree directed that there would be a sale in default of payment to the applicant as well. This is the point now for determination in this application.

The point raises important problems of law relating to the rights of a puisne mortgagee defendant in a suit brought by a prior mortgagee for enforcing the prior mortgage. The law on this point has been controversial and requiries to be clarified. The puisne mortgagee is added as a defendant in such a suit

only for the purpose of redeeming the prior mortgage if he wished and proving his mortgage and having the accounts taken. Such account of the puisne mortgagee is taken because if there is any surplus sale proceeds after meeting the prior mortgagee plaintiffs claim he can participate in such surplus sale proceeds as may be available for the satisfaction of the claim of the puisne mortgagee. Essentially and fundamentally therefore the rights of a puisne mortgagee defendant in a prior mortgagee's suit are first the right to redeem the prior mortgage and secondly the right to participate in surplus sale proceeds. But apart from these rights it is difficult to see how such a puisne mortgagee can claim the carriage of proceedings in the suit and be substituted as a plaintiff and have the properties sold for the satisfaction of such puisne mortgagee. After all the suit was a suit by the prior mortgagee. If his claim has been satisfied then no further question of proceedings with the suit can normally arise. Except therefore the right to redeem and the right to participate in the surplus sale proceeds, I do not find that from the purely legal point of view a puisne mortgagee should have any further rights.

The problem however is much larger when it is judged from the more general aspect. After all a mortgage suit is instituted where all subsequent mortgagees are impleaded as defendants and where they are expected to prove their mortgages and their accounts taken. It would seem to be unreasonable why in that context simply because the prior mortgagee at whose instance the sale had been ordered is paid off the other subsequent mortgagees with their mortgages proved should be relegated to file different suits for enforcing their mortgages by sale and otherwise. From this point of view it will appear that the law encourages multiplicity of proceedings. But the balance of authorities which require to be examined on this point appears to settle this point in favour of the stricter and perhaps more technical view of the law. I will also attempt to show after the examination of the authorities on the point the law is not so insensible as it may appear.

In *Vedavyasa Ayyar* v. *The Madura Hindu Labha Nidhi Co. Ltd.* (1), it is said that the puisne mortgagee is not entitle to

(1) (1918) 42 Mad. 90.

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execute the decree for the amount due to him when no sale was held for the realisation of the amounts due to the prior mortgagee and that the remedy of the puisne mortgagee was a suit for sale. That decision also observes that from this point of view Section 47 of Civil Procedure Code was no bar nor was the decree in the previous suit a *resjudicata*. Kumaraswami Sastri J. delivering judgment in that case with which Phillips J. agreed after referring to the decisions of *Mackintosh* v. *Watkins* (1), *Kissory Mohan Roy* v. *Kali Charan Ghose* (2), *Sururijigur Begum* v. *Barodakant Mitter* (3), *C. P. Govinda Taragan* v. *Veeram* (4), comes to the conclusion that in the form of decrees such as the present one that I am considering there is nothing to direct the mortgagor to pay off the subsequent mortgagees. It is true that the decree no doubt declares the amount due to such subsequent mortgagees. But the learned Judge observes:—

> "This was only with a view to enable them to share in the surplus should the properly be sold owing to non-payment of the sum due to the plaintiff who was the first mortgagee."

It is said that the right of the subsequent mortgagees under the decree drawn up according to Form 7 of App. D. of the Civil Procedure Code is contingent on the property being brought to sale for non-payment of the sum found due to the plaintiff mortgagee and the decree cannot be read as a decree directing the mortgagor to redeem each of the puisne encumbrances within the time limited for redeeming the first mortgagee. The learned Judge proceeds to observe at page 94:—

> "The utmost that can be said is that if the first mortgagee for some reason or other does not apply for sale in spite of the fact that he has not been paid the other mortgagees can apply for sale in order to work out the rights to share in the surplus if any. This is quite different from their applying to sell the property to discharge the amount declared due to each of them."

At the conclusion Kumaraswami Sastri J. observes:—

(1) (1904) C.L.J. 81.
(2) (1894) I.L.R. 22 Calc 100.
(3) (1909) 11 C.L.J. 563.
(4) (1911) I.L.R. 36 Mad. 32.

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"If the mortgagor pays off the amount for which alone a sale in default of payment was directed it is difficult to see how under the express terms of the decree each puisne encumbrancer can come forward and ask for sale. No time is fixed in the Decree for redeeming them. There is no direction in the decree directing the mortgagee to pay them any amount and the right to share which is dependent on there being a sale and a surplus after paying off the plaintiff mortgagee cannot be enforced if for any reason the sale cannot take place at the instance of the plaintiff."

Much of the difficulty and confusion on this branch of the law has been caused by the English practice as mentioned in *Platt* v. *Mendel* (1), and Daniel's Chancery Practice. But having regard to the provisions of the Transfer of Property Act and the present Civil Procedure Code the Indian practice is entirely different. In one of the more recent decisions of this Court in *Shiv Kumar Prosad* v. *The Trustee for the Improvement of Calcutta & ors.* (2), Chakravartti J. delivering judgment with which Ellis J. agreed observes at page 802:—

"It is true that he (puisne mortgagee) gets a free adjudication of his rights but the only practical relief which the decree gives him is that he is declared entitled to obtain satisfaction of his dues out of the surplus sale proceeds if any be left after satisfying the plaintiff's dues (see Form No. 9). The puisne mortgagee cannot apply for a final decree unless he himself pays off the prior mortgagee and the right to apply for a sale arises only if the plaintiff's dues are not paid but not if the puisne mortgagee's dues are not."

The learned Judge proceeds to observe:—

"When he is impleaded as a defendant in a prior mortgagee's suit he is brought before the Court whether he wishes to come or not and his rights are adjudicated on by the Court under the compulsion of Order 34 Rule 4(5)."

(1) (1884) 27 Ch. D. 246.

(2) (1947) 51 C.W.N. 798.

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In referring to the Madras decision which I have just quoted where it was said that the puisne mortgagee could have a right to apply for a sale if the prior mortgagee did not Chakravartti J. observes that the Madras decision was one under the old provisions of the Transfer of Property Act and such observation on that particular point was only in the nature of obiter dictum. Chakravartti J. at page 803 lays down:—

> "This supposed right is not warranted by the Civil Procedure Code as it now stands nor does it appear to us to have been warranted by the old provisions of the Transfer of Property Act."

This particular point which has been the source of so much confusion of law on the subject and so much of uncertainty in legal thought was very carefully considered by Pugh J. on the Original Side in *Sarat Chandra Roy Chowdhury* v. *M. M. Nahapiet* (1). The learned Judge there observes that prior to the Civil Precedure Code of 1908 there was a recognised practice on the Original Side of this court to treat the preliminary decree as being in favour not only of the first mortgagee but also in favour of the second mortgagee as observed by Sale J. in *Kissory Mohun Roy* v. *Kali Charan Ghose* (2). This principle was extended further in the report of an application in the same suit and also under the name of in the Matter of *Kissory Mohan Roy* v. *Kali Charan Ghose* (3), when Sale J. allowed a second mortgagee who was a defendant under the liberty retained to him by the preliminary decree to come in and obtain an order for sale of the property outside Calcutta which was subject only to the second mortgage not to the first. This previous practice on the Original Side of treating the suit as one for the benefit of the second mortgagee developed on the basis of the English practice laid down in *Platt* v. *Mendel* (4), Pugh J. in *Sarat Chandra Roy Chowdhury's Case* (1).

> "It will be observed that this procedure being based upon the old practise of the Original Side does not profess to

(1) (1910) I.L.R. 37 Calc. 907-9.
(2) (1894) I.L.R. 22 Calc. 100.
(3) (1896) I.L.R. 24 Calc. 190; 1 C.W.N. 106.
(4) (1884) 27 Ch. D. 246.

be in agreement with the terms of the Transfer of Property Act."

And in support of that proposition he quotes the decision of Brett and Mookerjee JJ. in *Mackintosh* v. *Watkins* (1), holding that under the Transfer of Property Act the proper procedure was different and that the second mortgagee was made party to the suit only to have an oppertuntiy of redeeming if the wished and to participate in the surplus sale proceeds.

Although a priori this legal situation may appear to be hard on the puisne mortgagee in fact it is not so. Common fairness requires in accordance with equitable principle that before the mortgagor's property is sold he should have the right to redeem. The puisne mortgagee in a prior mortgagee's suit does not give the mortgagor any right to redeem the puisne mortgage. Secondly a puisne mortgagee should not have any right of sale in a prior mortgagee's suit without redeeming the prior mortgage. Indeed in Order 34 Rule 5 of the Code as well as in present Form 6 of App. D of the Code for final decree of sale this principle is expressly recognised by stating that the property is being sold not only because the mortgagor has failed to pay but also because the puisne mortgagee has failed to redeem the prior mortgagee.

Finding this difficulty Mr. P. P. Ghose learned counsel for the applicant advanced the line of argument that although that may be the law in this case it is the consent decree made in a suit for reopening a mortgage transaction and the terms of the decree are different from the terms usually to be found in mortgage decrees. Emphasis is therefore laid by Mr. Ghose on the words in the decree, "default having been made in payment of the amounts due to the plaintiff and the said defendant Sm. Nirmala Sundari Dasi the said mortgage properties or a sufficient part thereof be sold". Therefore it is argued that the properties are being sold also because the money due to the applicant puisne mortgagee was not paid. But that stage is passed. The order for sale was taken by the plaintiff and not by the applicant. It was after the final order for sale had been

(1) (1904) 1 C.L.J. 31.

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made at the instance of the plaintiff that the sale was fixed for the 17th May 1952 and was avoided by the mortgagor defendant paying off the plaintiff. Therefore there is no other order for sale under which any sale can be continued or held. The applicant did not obtain any order for sale of the properties. The reason can be supported also by what follows in the terms of this consent decree. The terms of the consent decree lay down that the money that was going to be realised by the sale was to be paid first to Narayan Chandra Dutt then to the plaintiff and only thereafter if any balance remains to the applicant. That to my mind indicates that even by the terms of this consent decree the only right is a right to the balance that the applicant has got and nothing more. To accede to the prayers of the applicant will therefore mean supplanting the whole consent degree for sale and making a new decree altogether at this stage. Such a procedure will be unknown in law. The construction of this particular consent decree therefore does not appear to me to invest this puisne mortgagee with any novel and additional rights apart from those found in the usual decrees in this respect.

For these reasons this application must fail and is dismissed with costs.

S. K. Ghosh: Solicitor for the Appellant.

T. Banerjee & Co.: Solicitors for the Respondent.

S.K.R.C. *Application dismissed.*

Note: This Judgment was upheld on—by the Court of appeal in Appeal No. 44 of 53 dated 9-12-53 by P. B. Chakravartti, C.J. and Lahiri, J.

ORIGINAL CIVIL.

Before Mr. Justice Sarkar.

CIVIL

1954.

July, 29

PROSAD NATH DAS

v.

JATINDRA KUMAR DAS & ORS.*

Partition Suit—Receiver appointed of the properties—Whether co-sharer liable to pay occupation rent.

Held—in a partition suit, a co-sharer in occupation of a fair share of the family dwelling house, can be asked to go out without provision being made for his residence.

Narayandas Deora v. *Issurdas Deora & ors.* (1), distinguished

The material facts will appear from the judgment.

S. Chatterjee for the Plaintiff.

A. N. Sen and J. N. Roy for the Defendants.

The judgment of the Court was as follows:—

Sarkar, J.:—In this suit an order had been made appointing a receiver of various government and other securities and shares and of the rents, issues and profits of various immovable properties, including a certain house. The order directed the defendants to deliver possession of the immovable properties to receiver. Such possession was delivered excepting of the house in which two of the defendants are residing. The receiver has not yet asked them to vacate: The present application is for an order on these defendants to pay occupation rent.

It is said that in view of the terms of the order their occupation of the house after the date of the order is wrongful. They

(1) Suit No. 1700 of 1949 decided by Bachawat, J dated 4th & 5th September 1952 Unreported.

* Original Side Suit No 2624 of 1952

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must therefore pay occupation rent. It is also said that it was so decided *Narayandas Deora* v. *Issurdas Deora & Ors.* (1).

I do not think Bachawat J. intended to lay down a broad proposition. In the case before him, the claim in the suit itself was for compensation for occupation of a portion of the joint property by a co-sharer. Therefore, if a receiver is appointed in such a suit and that party is directed to make over possession to the receiver, his default in doing so may fairly be said to make him liable to pay occupation rent. Bachawat, J. followed the case of *Yorkshire Banking Co.* v. *Mullan* (2), which was a case of a receiver having been appointed in a mortgage suit at the instance of the mortgagee. The mortgagee is entitled to possession of the mortgaged property and therefore the possession thereof by the mortgagor after a receiver has been appointed becomes wrongful. Reference was also made to the case of *Pulin Behary De* v. *Satya Charan De* (3). This was a suit by one co-sharer against another in which the plaintiff, in substance, complained of ouster by the defendant. It was on these facts that the possession by the defendant of the property in suit after the appointment of a receiver was held to be wrongful.

The present case is entirely different. Here no claim is made against the defendants for their occupation of the house in question, neither is the petitioner entitled to possession of the property from the defendants nor is there any allegation of ouster by the defendants. I therefore do not think that the decisions cited above conclude the point.

The facts here are that one Radhakanto Das left a will under which the properties in suit have now come to the parties to it, who are his sons and grandsons. The house in question was the residential house and the will directed that his descendants

(1) Suit No. 1700 of 1949 decided by Bachawat, J. dated 4th & 5th September, 1952 Unreported

(2) (1887) 35 Ch. D. 125.

(3) (1920) A I.R. Calc 319.

would reside in the house, at least, till the death of his widow which event happened shortly before the suit: The suit is for administration of the estate and for its partition in terms of the will. It is not disputed that the parties are all entitled to reside in the house till it is partitioned. Nor is it disputed that a co-sharer is not liable to pay compensation for occupation of a joint residential house so long as such occupation does not amount to an ouster of the other co-sharers. True, some of the parties are not residing in that house but it is not even alleged that the defendants residing there are in any way responsible for this. No complaint is made either in the plaint, or in the petition on which the receiver was appointed nor in the present petition against the defendants regarding their residence in the house.

I am not aware of any principle by which in a partition suit, a co-sharer in occupation of a fair share of the family dwelling house, can be asked to go out without provision being made for his residence. That in my view would be a most inequitable thing to do. This is what I am asked to do. I am unable to accede to that request.

It is then said that the defendants should have at the time the order for receiver was made, obtained permission to continue to reside in the house free. It is said that in view of the form of the order, it is too late now for the defendants to claim a right to reside in the house free. I do not think that this is a fair argument. The point as to whether the receiver would get vacant possession from the defendants in residence was not raised at all and was in nobody's mind. It is obvious, because no complaint had been made that the defendants' possession was in any way wrongful. Indeed the receiver had been appointed on the application of one of the defendants who opposes this application and says that though he does not reside in the house, he has one room of it in possession locked up where he has kept his things. The point cannot be said to have been decided.

I have come to the conclusion that the form of the order does not decide the question. In my view the order never

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intended that the parties living in the dwelling house should vacate. All that it meant was that the receiver should take formal possession thereof. That is quite clear because even the petitioner has not asked the receiver to call upon the defendants to vacate.

If it is necessary, I would go further and say that in my discretion I do not propose to direct the defendants to pay an occupation rent as that in my view, would in the circumstances of the case, be most inequitable. It cannot be right in a partition suit in the absence of special circumstances, by means of a receiver to deprive the parties of all their properties and even their dwelling house and make them shift for themselves. I will repeat that no special circumstances were relied upon in this case and the only ground on which the order was sought was that the defendants were directed to make over possession to the receiver and have failed to do so.

In these circumstances I refuse the application. There will be no order for costs.

L. M. Dutta Choudhury: Solicitor for the Plaintiff.

J. M. Rakshit & Nan & Dey: Solicitors for the Defendants.

S.K.R.C. *Application refused.*

CRIMINAL REVISION.

Before Mr. Justice Chunder.

GOLAM AHIA (*alias*) GHULAM EHIYA

v.

LUTFAL HODA (*alias*) HODAI & ANR.*

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July, 8.

Excavation of Earth—Mischief Under Section 426 I. P. C.—Section 242 Criminal Procedure Code will apply here.

The Prosecution case was that the accused had excavated earth from the land of the complainant and as earth has some value, whatever may be its actual worth, the accused in law committed mischief under Section 426 I. P. C. if facts are proved. The Magistrate does not find on the facts that no Magistrate to say, that the value of the loss not having been stated by the complainant the accused must be acquitted.

If the Magistrate thought that the accused had not full notice of the offence, under Section 242 Cr. P. C., that he had to answer in that very Magistrate's Court, the proper procedure of the Magistrate would have been to explain the offence as fully as the Magistrate was capable of till he was satisfied on that score and try the accused again after the accused had full notice of the offence, he had to meet.

The material facts will appear from the judgment.

Jnanendra Mohan De for the Petitioner.

G. Chatterjee for the Opposite Parties.

The judgment of the Court was as follows:

Chunder, J.:—This Rule was issued against an order of acquittal of an accused person by a Magistrate, First Class, Burdwan, of an offence under Section 426 of the Indian Penal Code.

It is rather surprising that a Magistrate of the First Class is total ignorant of the Indian Penal Code or the Code of Criminal

* Criminal Revision Case No. 198 of 1954 against an Order of acquittal of a person by a Magistrate, First Class, Burdwan, of an offence under Section 426 Indian Penal Code.

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Chunder, J.

Procedure. He has not entered at all into the facts of the case but acquitted the accused on two so-called preliminary points.

The prosecution case was that the accused had excavated earth from the land of the complainant and as earth has some value, whatever may be its actual worth, the accused in law committed mischief under Section 426 of the Code, if facts are proved. The Magistrate does not find on the facts that no Magistrate to say that the value of the loss not having been stated by the complainant the accused must be acquitted. The Magistrate would have been justified in not trying the accused for any of the graver offences like Section 427 etc. as the value was not stated, but any value, however trifling it may be, is quite sufficient for an offence under Section 426 of the Indian Penal Code and the taking earth from some ones land certainly deprives him of or destroys some property which has some value. Therefore, there was no reason for an acquittal on that preliminary point by the Magistrate. He should have gone into the facts.

His second preliminary point is that the offence was not fully explained to the accused under Section 242 of the Code of Criminal Procedure. If he thought that the accused had not full notice of the offence, under Section 242 of the Code, that he had to answer in that very Magistrate's Court, the proper procedure for the Magistrate would have been to explain the offence as full as the Magistrate was capable of till he was satisfied on that score and try the accused again after the accused had full notice of the offence, he had to meet. That omission by the Magistrate himself gave the Magistrate no power to acquit the accused person without entering into the merits of the case at all. As I have said, it is time that a First Class Magistrate made himself acquainted with the law which he is dispensing.

The Rule is accordingly made absolute. The acquittal is set aside and the matter is remanded to be tried by some other Magistrate to be selected by the District Magistrate Burdwan. The 8th June, 1954.

K.P.T.

Rule made absolute. and the matter is remanded.

CIVIL REFERENCE

Before Mr. Justice S. C. Lahiri.

BHUPATI SINGH & OTHERS

v.

JNANENDRA KUMAR CHOWDHURY*

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July, 30

Court-Fees Act, Secs. 5,7 (iv), 8c—Suits Valuation Act, Secs. 8,11—Procedure to be adopted when a suit, valued at Rs. 100/- for the purpose of Court-Fees but valued at Rs. 5,500/- for the purpose of jurisdiction, is tried by a Subordinate Judge without any objection raised by defendants and thereafter an appeal is preferred to High Court.

The suit was for declaration of plaintiffs' occupancy right in the disputed land and for permanent injunction restraining defendants from interfering with plaintiff's possession. In the plaint, plaintiffs alleged that the present market value of the properties in dispute was Rs. 5,500/- and the net profits from the properties amounted to Rs. 175/- and fifteen times the net profits were equivalent to Rs. 2.625/-. The aforesaid amounts were mentioned in the plaint for the purpose of determining the jurisdiction of the Court, but plaintiffs paid Court-fees on Rs. 100/- only at which they valued the relief for an injunction. In the Trial Court an issue was raised about sufficiency of Court-fees but at the trial that issue was not pressed. The Subordinate Judge, in whose court the suit was filed, having dismissed the suit on merits, plantiffs have preferred appeal to the High Court. The memorandum of appeal presented to the High Court, has been valued by plaintiffs at Rs. 5,500/- but plaintiffs have paid Court-fees only on Rs. 100/-. The Stamp-Reporter took objection to putting two valuations, one for jurisdiction and another for Court-fees. The matter was then considered by the Taxing Officer. As the question is one of general importance, the matter was placed before the Chief Justice for being considered by a Judge.

Held—that the suit comes under Section 7 (iv) (c) of the Court-fees Act; that, as such, plaintiffs, have the right to value their own relief subject to revision by Court under Section 8c of the Court-fees Act; that, as no rules have been framed to guide courts in making such revision, the valuation given by plaintiffs of the relief for injunction in their plaint cannot be revised or altered by Court; that, the suit coming under Section 7(iv) of the Court-fees Act, it is governed by Section 8 of the Suits Valuation Act which requires

*Court Fee Matter (F.A.T. No. 2097 of 1953) Reference under section 5 of the Court-fees Act.

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that the value as determinable for computation of Court-fees and the value for purposes of jurisdiction shall be a single valuation both for the purpose of jurisdiction and for the purpose of Court-fees.

Held further—that if the valuation of the suit and of the appeal to the High Court be Rs. 100/- only, neither the Subordinate Judge had jurisdiction to try the suit nor will the High Court have jurisdiction to entertain the appeal; that, so far as the decision of the Subordinate Judge is concerned, plaintiffs are protected by the provision of Section 11 of the Suits Valuation Act in as much as defendants did not raise any objection with regard to the Subordinate Judge's jurisdiction to try the suit ; that so far as the appeal to the High Court is concerned, Section 11 of the Suits Valuation Act will not help plaintiffs in as much as the appeal has not yet been heard and the respondents have not yet entered appearence ; that in a Section like this the proper procedure will be to require plaintiffs to amend the valuation in the memorandum of appeal and in the plaint either at less than Rs. 5000/- or more than Rs. 5000/- and, according as they do that or not, they will have an appeal to the High Court or somewhere else ; that, so far as this appeal to the High Court remains valued at Rs. 100/- only, it cannot be entertained by the High Court and the memorandum of appeal will be returned to the filing advocate.

Reference under Section 5 of the Court-fees Act. Suit for declaration of title and for permanent injunction. The material facts will appear from the judgment.

Basanta Kumar Panda for the Appellants.

Hemendra Kumar Das, Senior Govt. Pleader for the Respondent.

The judgment of the Court was as follows :—

July, 30

S. C. LAHIRI, J :—This is a reference under section 5 of the Court Fees Act.

The plaintiffs who are the appellants in this Court filed a suit in the court of the Subordinate Judge, Second Court, Midnapore, praying for (a) a declaration that they had an occupancy right in the disputed land on the strength of a settlement and also on the ground of possession for more than twelve years ; and (b) for a permanent injunction restraining defendants Nos. 1 and 2 from interfering with

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the plaintiff's possession on the strength of a decree which had been obtained by them. In paragrph 14 of the plaint the plaintiffs alleged that the present market value of the properties in dispute is Rs. 5,500 and the net profits from the properties amount to Rs. 175/- and fifteen times the net profits will be equivalent to Rs. 2,625. The aforesaid amounts were mentioned for the purpose of determining the jurisdiction of the Court, but the plaintiffs were in possession of the disputed lands and that defendants Nos. 1 and 2 were merely threatening to dispossess the plaintiffs. The plaintiffs, therefore, valued the relief for an injunction against defendants Nos. 1 and 2 at Rs. 100/- and paid court fees upon that amount. In the trial court an issue was raised as to whether the plaint had been sufficiently stamped. At the trial, however, this issue was not pressed and it was decided in favour of the plaintiffs. As a result of the trial, the learned Subordinate Judge has dismissed. The plaintiffs have brought this appeal. The memorandum of appeal, which has been presented to this court, has been valued by the plaintiffs at Rs. 5,500/- presumably on the basis of the valuation which was given by the plaintiffs in paragraph 14 of the plaint as to the market value of the properties in dispute. The courtfees, however, were paid by the plaintiffs on the valuation of Rs. 100/-. The Stamp Reporter took an objection to the manner in which the plaintiffs have put two valuations for jurisdiction and for court-fees. It was pointed out that under section 8 of the Suits Valuation Act, the valuation for the purpose of jurisdiction must follow and be the same as the valuation for the purpose of court-fees, and that, at any rate, there must be a single valuation both for the purpose of jurisdiction and for the purpose of court-fees.

The Stamp Reporter has further suggested that in this case as the over-valuation made by the plaintiffs has resulted in the suit being tried by a Subordinate Judge, the plaintiffs must be directed to amend the valuation to a figure which is above the maximum limit of the pecuniary jurisdiction of the

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The matter was then considered by the Taxing Officer and upon a review of the authorities on the point, the Taxing Officer came to the conclusion that in view of a judgment of Sir Asutosh Mookerjee in case of *Sailendra Nath Mitra v. Ram Chandra Pal* (1) there was some difficulty in asking the plaintiffs to value the appeal or the plaint at a figure higher than Rs. 100/- and as the question is a question of general importance, he placed the matter before the learned Chief Justice for being considered by a Judge.

Mr. Panda appearing in support of the plaintiff-appellants has conceded that the case comes under section 7 (iv), but he contends that it comes under section 7 (iv) (d) of the Court-fees Act. On behalf of the State, the learned Senior Government pleader has contended that the case really comes under section 7 (iv) (c) of the Court Fees Act. On a consideration of the prayers made by the plaintiffs in their plaint, it seems to me that the prayer for injunction is really a consequential relief which flows from or is ancillary to the prayer for declaration made by the plaintiffs in their plaint. I therefore hold that the present case comes under section 7 (iv) (c), but the question whether the case comes under clause (c) or clause (d) is of no practical importance in this case, because in either case the plaintiffs will have a right to value their own relief subject, of course, to the provisions of section 8C of the Court-fees Act, under which the Court is given the power to revsie the valuation put by the plaintiff, if it appears to the Court to be grossly inadequate. In view of the Full Bench decision of this Court however in the case of the *Narayanganj Central Co-operative Sale and Supply Society, Ltd. v. Mafizuddin Ahmed* (2) and the decision of this Court in the case of *Sarojemohan Chatterjee v. Jibanmull Babu* (3) it cannot now be disputed that having regard to the fact that according to the plaintiff's allegations

(1) (1921) 25 C.W.N. 768.
(2) (1934) 38 C.W.N. 589.
(3) (1953) 57 C.W.N. 909.

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they are in possession of the lands in dispute the valuation given by the plaintiffs for the relief asked for by them cannot be revised by the Court in the absence of rules framed for that purpose. The valuation of the relief for injunction which has been given by the plaintiffs in their plaint cannot, therefore, be revised or altered by this Court. Since, however, the suit comes under section 7, paragraph (iv), it is governed by section 8 of the Suits Valuation Act which requires that in a suit of this description "the value as determinable for the computation of court-fees and the value for purposes of jurisdiction shall be the same." It has been established by a series of decisions that this provision of the Suits Valuation Act means that there must be a single valuation both for the purpose of jurisdiction and for the purpose of court-fees and further that the valuation for the purpose of jurisdiction shall be determined by the valuation for the purpose of court-fees, but not *vice versa*. [Vide *Sailendra Nath Mitra v Ram Chandra Pal* (1) and *In the matter of Kalipada Mukherji* (2).] If that be so, the valuation of the present suit and the present appeal must be Rs. 100/-, but in that case neither the Subordinate Judge would have jurisdiction to try the suit, nor will this Court have the jurisdiction to entertain this appeal, because I am informed that the Munsif of Jhargram, where the disputed properties are situate, has pecuniary jurisdiction up to the value of Rs. 3,500/-. If the suit had been properly valued by the plaintiffs in the trial Court, the Munsif of Jhargram would have been competent to try the suit and the appeal to this court would be incompetent, because the value of the subject-matter of the appeal is below the minimum pecuniary jurisdiction of this court. So far as the decision of the Subordinate Judge is concerned, the plaintiffs are perhaps protected by the provision of section 11 of the Suits Valuation Act which provides that "an objection that by reason of the over-valuation * * of a suit * * a Court of first instance * * which had not

(1) (1921) 25 C.W.N. 768.
(2) (1930) 34 C.W.N. 870.

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jurisdiction with respect to the suit exercised jurisdiction with respect thereto shall not be entertained by an appellate Court unless the objection was taken in the court of first instance at or before the hearing at which issues were first framed * * or the appellate Court is satisfied, for reasons to be recorded by it in writing, that the suit * * was over-valued or under valued, and that the over-valuation or under-valuation thereof has prejudicially affected the disposal of the suit". In the present case the defendants did not raise any objection as to the jurisdiction of the Subordinate Judge to try the suit. Therefore, under section 11 of the Suits Valuation Act, they are precluded from challenging the decision of the Subordinate Judge on the ground of absence of jurisdiction. So far as the appeal to this Court however is concerned, section 11 will not apply, because the appeal has not yet been heard and the respondents have not yet entered apperance and it will be open to the respondents to take a preliminary objection as to the maintainability of the appeal in this Court on the ground that the valuation of the appeal is only Rs. 100. In a situation like this, it seems to me that the procedure recommended by Sir George Rankin in the case of *In the matter of Kali Pada Mukherji* (1) should be followed. In the case his Lordship made the following observations at page 876 :

"But the figure at which he (plaintiff) values it is not to be less than Rs. 2,000/- in view of the fact that he has represented the value for purposes of jurisdiction to be a figure which has resulted in the case being already tried by a Subordinate Judge. It will be open to the plaintiff to value it at less than Rs. 5,000/- or at more than Rs. 5,000/- and, according as he does that or not, he will have an appeal to the High Court or somewhere else".

Applying this principle to the circumstances of the present case, I think the fairest thing for me to do will be to require

(1) (1930) 34 C.W.N. 870.

the plaintiffs to amend the valuation in the memorandum of appeal as well as in the plaint, but the figure at which the plaintiffs will value the plaint and the memorandum of appeal must be over Rs. 3,500/-, which, I am told, is the maximum limit of the pecuniary jurisdiction of the Munsif of Jhargram. In this case also the plaintiffs will have the liberty to value the relief asked for in the plaint and in the memorandum of appeal at less than Rs. 5,000/- or more than Rs. 5 000/- and according as they do that or not, they will have a right of appeal in this Court or elsewhere. The taxing officer refused to make this order, because according to him the decision of Sir Asutosh Mookerjee in the case of *Sailendra Nath Mitra v. Ram Chandra Pal* (1), stood in the way. In that case Mookerjee, J, was dealing with a second appeal and the objection as to jurisdiction had not been raised either in the court of first instance or in the lower appellate court and there was no doubt that a second appeal would lie even upon the valuation which the plaintiffs were required to give and for that reason Mookerjee, J, observed that section 11 would protect the plaintiffs. In the case before me, however, although section 11 of the Suits Valuation Act will protect the plaintiffs' right so far as the decision of the Subordinate Judge is concerned, that section will be of no assistance to the plaintiffs with regard to the appeal in this Court. For that reason I have come to the conclusion that section 11 of the Suits Valuation Act will have no application to the present appeal and if section 11 stands out of the way, the only decision which will govern the rights of the parties will be the decision of Sir George Rankin in the case of *Kalipada Mukherji*. (2).

Mr. Panda appearing for the appellants has invited my attention to a decision of the Supreme Court in the case of *Kiran Singh* v. *Chaman Paswan* (3). In this decision their Lordships have considered the effect of section 11 of the Suits Valuation Act as well as of section 21 and section

(1) (1921) 25 C.W.N. 768.
(2) (1930) 34 C.W.N. 870.
[3] (1954) S.C.A. 725.

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99 of the Code of Civil Procedure. After considering those sections, their Lordships laid down the following principle :

"The policy underlying sections 21 and 99 of the Code of Civil Procedure and section 11 of the Suits Valuation Act is the same, namely, that when a case had been tried by a Court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it had resulted in failure of justice, and the policy of the legislature has been to treat objections to jurisdiction both territorial and pecuniary as technical and not open to consideration by an appellate court, unless there has been a prejudice on the merits". This decision certainly assists Mr. Panda's clients so far as the decision of the Subordinate Judge is concerned and, as I have already pointed out, it will not be open to the respondents to challenge the decision of the Subordinate Judge on the ground of want of pecuniary jurisdiction in view of the fact that they did not raise that point in that Court ; but this judgment of the Supreme Court will not help the appellants, so far as the present appeal is concerned, because, in my view, if the memorandum of appeal in this Court is valued at Rs. 100/- only, it cannot be entertained by this Court.

For the reasons given above, I direct that the appellants should be given time till the 30th November, 1954, to file an application for the amendment of the valuation in the memorandum of appeal as well as in the plaint on the lines indicated above, and they will also pay deficit court fee on the amended valuation within the aforesaid time.

I have given time till the end of November, 1954, at the special request of Mr. Panda, who has represented to me that his clients being agriculturists cannot, at this season of the year, collect sufficient funds. If the valuation in the memorandum of appeal and in the plaint be amended and the deficit court-fees paid as directed above, the memorandum of appeal will be registered, failing which it will be returned to the learned Advocate.

P. K. D.

Appellants directed to file an application for amendment of the valuation.

ORIGINAL CIVIL.

Before Mr. Justice P. B. Mukharji.

MUTTRA ELECTRIC SUPPLY CO. LTD.

v.

GOPAL SARAN KULASRESTHI.*

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1954.

August 16.

Clause 12 of the Letters Patent—Grant of leave when cause of action is alleged to have arisen partly within and partly without the jurisdiction —Application for revocation—Plaint most material document for decision —Matters to be taken into consideration—Balance of convenience if can be taken into consideration—Nature of jurisdiction conferred by Clause 12—Granting of leave, if discretionery—Power of Court to revoke leave granted ex-parte—Grant of leave, if an irretrievable act of Court.

In considering an application for revocation of leave granted under Clause 12 of the Letters Patent the most material document to be considered is the plaint itself. Where the plaint discloses that the registered office of the Plaintiff Company is in Calcutta and that the Defendant's employment is controlled from Calcutta but all the acts of the Defendant giving rise to the cause of action had arisen at Muttra where the Defendant works and resides and where the Company has its undertaking, balance of convenience, *inter alia*, is a material factor for consideration of the application for revocation.

Clause 12 of the Letters Patent grants power to the High Court to try and determine suits of every description broadly classified into two divisions, namely, (a) suits for land and immoveable property and (b) other suits. Total and absolute jurisdiction is conferred upon the Court by Clause 12 in respect of suits for land and immoveable property situated wholly within its jurisdiction and in respect of suits, other than for land and immoveable property, where the cause of action has arisen wholly within its jurisdiction and also where, at the time of institution of the suit, the defendant dwells or carries on business or personally works for gain within its jurisdiction, irrespective of the fact where the cause of action arose. In these categories of cases the jurisdiction of the Court is absolute. The other class of jurisdiction conferred by Clause 12 is in respect of suits in which part of the land is situated or part of the cause of action has arisen within the jurisdiction. In such cases there is only an inchoate jurisdiction which comes into action upon the Court granting leave and by granting such leave the Court acquires a tentative jurisdiction which is liable to exception by the Defendant. In granting this leave and assuming jurisdiction the Court performs a judicial function according to its discretion. It can re-consider its ex-parte act on the principle that no ex-parte act of the Court should cause harm or prejudice to a litigant. The grant of such leave is not an

* Application in Re: Original Side Suit No. 699 of 1954.

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irretrievable act of the Court taking away its jurisdiction and leaving no way, except appeal, to revoke the leave. The Court in granting and revoking leave under Clause 12 can take into account, amongst others, such relevant factors as the subject matter of the suit, the parties to the suit, the witnesses required for proof of the respective cases of the parties, expenses of trial, in considering the balance of convenience in a particular case.

Application for revocation of leave under Clause 12 of the Letters Patent by the Defendant.

Leave was granted on the ground that the defendant resides outside jurisdiction of this Court but that a part of the cause of action arose within and a part outside the Ordinary Original Jurisdiction of this Court.

The material facts will appear from the Judgment.

T. P. Das for the Applicant Defendent.

L. P. Mukherjee, R. Goho, G. N. Nandi for the Respondent Plaintiff.

The Judgment of the Court was as follows:—

August, 16.

P. B. Mukharji, J.:—This is an application for revocation of leave under Clause 12 of the Letters Patent. The plaintiff has obtained leave in this case on the ground that the defendant resides outside the jurisdiction of this Court but that a part of the cause of action arose within and a part outside the Ordinary Original Jurisdiction of this Court. The application is made by the defendant and resisted by the plaintiff.

In such an application the plaint is the most material document on which the decision should rest although such decision does not rest merely on a criticism of the pleading. The petition and the affidavits in support of and against the revocation of leave are relevant but must be read subject to the over-riding considerations and facts pleaded in the plaint. It is not unusual that in such petition and affidavits the plaintiff and the defendant are prone to overstate their respective cases for and against the

leave, and such overstatement should be toned down by reference to the plaint.

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I therefore consider it necessary to proceed straight to analyse the plaint in this suit. The plaint in this suit is by the Muttra Electric Supply Co., Ltd. The defendant is its employee, the Resident Engineer of the plaintiff company at Muttra. The parts of the cause of action that are pleaded to have arisen within the jurisdiction of this Court are based on the following congeries of facts.

The plaintiff company itself is described in the cause title of the plaint as having its "registered office and principal place of business at No. 15, Shib Thakur Lane, Calcutta—7, within the jurisdiction of this Court." The prayers sought in the plaint reflect the cause of action. Analysing the reliefs in the plaint I find the plaintiff company is asking for a declaration that the employment of the defendant under the plaintiff company has been duly and properly terminated by its letter dated the 26th June 1954, an injunction restraining the defendant from functioning and working as Resident Engineer or in any other capacity at Muttra or at any other place where the plaintiff company carries on business, and an injunction restraining the defendant from entering the bungalow at Muttra within the compound of the plaintiff company or any other place of business and in any way handling or interfering with the business, plants, machinery, wirings and cables of the plaintiff company. It appears from paragraphs 10 and 11 of the plaint and it is distinctly pleaded there in express terms that the defendant is in actual possession of the bungalow at Muttra in his capacity as Resident Engineer and that after the termination of the defendant's services his continued possession has become wrongful. The plaintiff in this plaint is, in effect, indirectly asking for the recovery of possession of the bungalow, although knowing that a claim in that form would be a suit for land or immovable property outside the jurisdiction of this Court and therefore hit by Clause 12 of the Letters Patent, it has done it under the cover of a prayer for injunction. In particular, the form of injunction in which the relief in the plaint is couched is significant. The

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form is, as I have already set out, one asking for an injunction restraining the defendant from entering the bungalow. No question of entering the bungalow arises, having regard to the express pleading in paragraphs 10 and 11 where it is pleaded as a fact that the defendant is already in the bungalow and is in possession of it. It is, therefore, contended on behalf of the applicant that by the very nature of the plaint, so far as this relief is concerned it is better tried at Muttra and by the formulation of the prayer in the shape of an injunction the plaintiff company should not be allowed to cover up the fact that the particular relief in respect thereof in this suit is essentially one for the possession of the bungalow.

It is essentially a dispute between the master and the servant. As will appear from the plaint, the defendant acted as Resident Engineer of the plaintiff company at Muttra. The case of the plaintiff company is that it lawfully terminated the employment of the defendant by its letter of the 26th June 1954. The allegation of the plaintiff company is that the defendant has been guilty of various acts of insubordination and of acts prejudicial to the working of the plaintiff company's undertaking, which include fomenting labour trouble and agitation and strike at Muttra. It is also the allegation of the plaintiff company that the defendant refused to hand over charge to its Chief Officer of the Office and the vacant possession of the bungalow which the defendant was occupying in his capacity as Resident Engineer at Muttra. This refusal is alleged to have taken place at Muttra on the 30th June, 1954.

It is expressly pleaded in paragraph 13 of the plaint that this refusal gave rise to the plaintiff's cause of action in this suit. The grounds on which the plaintiff asked for and obtained from this Court leave under Clause 12 of the Letters Patent are set out in this paragraph 13 of the plaint. The grounds are that the defendant is residing outside jurisdiction, that the plaintiff company's Head Office is in Calcutta, that the plaintiff Company's undertaking is at Muttra, and that the employment of the defendant is controlled from such Head Office of the plaintiff company in Calcutta within the jurisdiction of this Court and that the contract of employment was effected by cor-

respondence from within the jurisdiction of this Court, and that the notice of termination of the defendant's employment was given by the plaintiff company from within the said jurisdiction.

It is now argued on behalf of the applicant defendant that this leave should be revoked. Mr. T. P. Das, learned counsel on behalf of the applicant, argues that this Court should on the facts as pleaded in the plaint revoke in its discretion the leave which it has already granted on the basis that a part of the cause of action as pleaded arose within the jurisdiction of this Court.

His first argument is based on certain facts appearing on the plaint itself. He says that the defendant is not resident within jurisdiction. The whole fact of employment and the work in connection with which this dispute arises took place at Muttra outside jurisdiction. Not only the supply of electricity, the service by the defendant and his major activities, if not the whole of his activities as resident engineer, are matters arising at Muttra, but also even the refusal to obey orders or hand over the bungalow which the plaintiff company itself says had given rise to its cause of action took place outside the jurisdiction of this Court. For the purpose of this argument Mr. Das concedes that it may be taken that the control, direction or orders may be issued or exercised from the head office in Calcutta within the jurisdiction, but he says the actual grounds of complaint as pleaded in the plaint and as setting out the cause of action are all grounds and facts arising at Muttra outside the jurisdiction of this Court. In this connection Mr. Das particularly draws attention to the pleadings in paragraphs 7, 8 and 11 of the plaint, and argues that the alleged acts of insubordination, the alleged acts prejudicial to the plaintiff company's undertaking, the alleged fomenting of labour trouble and agitation, and the alleged refusal of handing over the bungalow are all outside the jurisdiction of this Court. It is, therefore, contended that the entire bundle of facts on which the plea of termination of the defendant's service is justified by the plaintiff company happened at Muttra. The issue in this case is not the fact of the defendant's appointment and employment by the plaintiff company,

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which are admitted, but the termination of his service and dismissal on the grounds alleged in the plaint.

The second argument of Mr. Das on behalf of the applicant concerns the more practical aspect of the balance of convenience at the trial of the suit. It is the applicant's case that the witness who would be necessary to prove the alleged acts of insubordination, the alleged acts prejudicial to the plaintiff company's undertaking, the alleged fomenting of labour trouble and agitation and the alleged refusal of handing over the bungalow will naturally be Muttra witnesses. It may be interesting to notice in this connection that in the very next application for injunction by the plaintiff, the plaintiff company itself has used affidavits of persons all affirmed at Muttra which go to show that even many of the plaintiff's witnesses are going to be Muttra witnesses. All the witnesses whom the defendant will call in order to defend himself against the charges for acts of insubordination, acts of prejudice, acts of incitement to labour and in fact against all the acts pleaded in paragraphs 7, 8 and 11 of the plaint will be of Muttra and not of Calcutta.

The applicant complains that it will be most harassing, vexatious and troublesome for him to come to Calcutta with all his witnesses from Muttra to refute the charges made by the plaintiff in this plaint. He says in his affidavit that he will be faced with the situation of having to ask for commission to examine almost all his witnesses who are residents of Muttra and not of Calcutta. Having regard to the various allegations in the plaint regarding the acts of insubordination and acts prejudicial to the plaintiff company's undertaking at Muttra, and acts of incitement of labour troubles, it is likely that the number of such witnesses will be large, in which event the examination of too many witnesses on commission will be not only costly but also a prolonged affair.

No reason, it appears, is set out in the plaint as to why this suit could not be or was not instituted at Muttra by the plaintiff. For the plaintiff company it may very well be said that its whole office establishment and local staff along with its Chief

Engineer and its properties and business including local offices and equipments are all at Muttra and all that the Head Office in Calcutta does is really administrative work. It is, therefore, certainly easier for the plaintiff to conduct this suit at Muttra than for the defendant to come here to Calcutta and defend this suit.

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All these considerations prove that the balance of convenience is in favour of Muttra being the proper place for litigating this dispute.

Realising this the plaintiff company has set out certain grounds in the affidavit of opposition of Kali Charan Bhagat affirmed on the 4th August 1954 in an attempt to show that the balance of convenience can also be taken to be in favour of this forum. These grounds are set out in paragraph 17 of his affidavit. Going through these grounds and scanning them it appears to me that while documents in the shape of letters and accounts and statements which are sent to the Head Office in Calcutta are certainly kept at the Head Office, the facts contained in such documents are all matters mostly to be proved to have happened at Muttra and by Muttra witnesses. This will be plain from such allegations pleaded in the various sub-paragraphs thereof as "Capital Works" in sub-paragraph (ii), or "Sundry Sales Return" as in sub-paragraph (iii) or details of allowances per month granted to consumers at Muttra as in sub-paragraph (iv), or monthly statements of impress account as in sub-paragraph (v), or monthly statements of cash receipts from consumers at Muttra as in sub-paragraph (vi), or revenue receipts as in sub-paragraph (vii) or statement of issues of stores and stocks at Muttra as in sub-paragraphs (viii) and (ix), and abstracts of wages and dearness allowances for food as in sub-paragraph (xi). They all seem to me to be not so much matters of letters of documents which are kept in the custody of the Head Office but they all relate to transactions that are taking place at Muttra, and if the plaintiff wants to prove any of those facts, then the facts contained in such letters and documents, accounts or statements, can only be proved by witnesses who took part in those transactions, and such witnesses are all likely to be Muttra

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witnesses. I have, therefore, no doubt in my mind that in the facts of this case the balance of convenience is certainly not in favour of Calcutta but in favour of Muttra.

Before leaving the discussion of the grounds of convenience of the plaintiff as urged in the affidavit in opposition of Bhagat there is one ground which I think requires a separate treatment. It is this. One ground pleaded in the affidavit in opposition is a feeling of fear in the mind of Kali Charan Bhagat, who incidentally is the Director-in-charge of the plaintiff company. He is afraid to go to Muttra. His case in the affidavit in opposition is that he feels that if he is compelled to go to Muttra there might be bodily injury done to him by miscreants under the control of the defendant. Now, not a word about this appears, however, in the plaint itself. If Muttra is not a place of safety, other places of safety near about Muttra could certainly be arranged by transfer of the suit from the Muttra Court. But it is unnecessary for me to go into this allegation of fear because it is not only disputed and denied by the defendant but also because this apprehension is not supported by any fact or incident which even remotely can be considered to be the cause of any threat to the deponent Kali Charan Bhagat. Nor am I satisfied that such a kind of threat cannot be secured against, even if it were true.

A good deal of law has been shown to me from the Bar. That was as was to be expected. Clause 12 of the Letters Patent of this High Court has fathered quite an unmanageable progeny of precedents. While it is not my desire to be a progenitor of a new theory of jurisdiction under Clause 12 of the Letters Patent in deciding this application, I am faced with the situation of having to decide at least one inescapable point of law that has been raised at the Bar. The point in its extreme form can be presented by saying that balance of convenience is not a consideration at all in an application for revocation of leave already granted by this Court under Clause 12 of the Letters Patent. It has been contended before me that the actual words of Clause 12 of the Letters Patent do not use the words "balance of convenience" and that the language of this Clause does

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not justify taking into consideration the doctrine of the balance of convenience in such an application. The argument really is, that once a litigant shows to this Court that a part of the cause of action has arisen within its jurisdiction, this Court has no option but to grant leave under Clause 12 Letters Patent. Once leave has been granted this court is left with no further jurisdiction to revoke the leave and the only remedy for the aggrieved defendant is to appeal against the order granting leave. Three fundamental questions require an answer. The first is that Clause 12 of the Letters Patent does not justify consideration of balance of convenience. The second is that the grant of leave when part of the cause of action is within jurisdiction is not discretionary but the court is bound to grant the leave. The third is that no further jurisdiction is left in this court to revoke the leave except by appeal.

I will first clear the ground by noticing the decisions referred to me. To begin with, there is a decision of the Supreme Court in *Chittaranjan Mukherjee* v. *Barhoo Mahto* (1). But that decision is of little help in this case because although it contains a discussion of the judgments under appeal on the balance of convenience, Patanjali Sastri, J. delivering the judgment in that case expressly said at p. 423 of that report: "We consider it, however, unnecessary in this case to enter upon a discussion of the balance of convenience."

The next decision cited at the Bar is *Ridh Karan Kabra* v. *A. Karamally & Sons* (2), a decision of the Court of Appeal of Harries, C.J. and Chakravartti, J. There Chakravartti, J. delivering judgment did consider the question of the balance of convenience as relevant on the question of leave prayed for under Clause 12 of the Letters Patent as also on the question of the revocation of such leave, and clearly pointed out that a slight tilting of the balance was not a decisive factor. Inconvenience caused to the parties for attending personally throughout the trial, expense or any other local or special conditions are, according to this authority, also matters relevant to the decision of the question of balance of convenience.

(1) (1950) 87 C.L.J. 420. (2) [1949] I.L.R. 2 Calc. 474.

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Then reliance was placed on the decision of *Bimal Singh Kothari & anr.* v. *Muir Mills Co., Ltd. & ors.* (1), of the Court of Appeal of Harries C.J. and Banerjee J. There it is laid down that the grant or revocation of the leave is a matter in the discretion of the Court to be exercised on well-established judicial principles. It is also decided in that case that in considering the question whether leave should be revoked or not the question of convenience is a material factor, though the convenience of the parties is not to be weighed in a delicate balance. That case is also an authority for the proposition that the nature of the suit and the question of comparative expenses are material considerations.

The decision of Rankin, C.J. and C. C. Ghose, J. in *Engineering Supplies Ltd.* v. *Dhandhania & Co.* (2), was also cited at the Bar. It is not necessary for me to discuss that decision in detail because it was quoted only on the ground of what constituted a cause of action. In that case it has been held that if the making of the contract be a part of the cause of action, then the act of concurrence of either party, which is essential to the contract, is itself a part of that cause of action.

Lastly, the decision of Das J. in *Madanlal Jalan* v. *Madanlal* (3), was relied upon by the applicant. It lays down the proposition that in the exercise of its discretion balance of convenience of the parties is a material consideration for the Court, and even if there be no evidence of bad faith or abuse of the process of the Court it should revoke leave where the balance of convenience is definitely in favour of the defendant.

Although from these authorities it appears to be settled law that in granting or revoking leave granted under Clause 12 of the Letters Patent the Court can and should consider the balance of convenience, yet not one of these cases appears to give the reason how and why the Court attracts the doctrine of the balance of convenience in deciding an application for revocation

(1) (1952) 56 C.W.N. 361; [1952] A.I.R. Calc. 645.
(2) (1930) I.L.R. 58 Calc. 539.
(3) [1945] I.L.R. 2 Calc. 333.

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of such leave. They appear to me to proceed on the assumption that balance of convenience is a necessary and a proper consideration without stating the reason why. It is this aspect of the case which invests this application with an importance which cannot be minimised.

The basic character of the jurisdiction of this Court under Clause 12 of the Letters Patent requires a more thorough investigation than it has received so far. Under this clause there is first a grant of power to this Court to receive, try and determine suits of every description. Then there is a broad classification of such suits into two divisions. The first classification is concerned with suits for land and immovable property and the second classification is with regard to other suits. Regarding the first class of suits relating to land and immovable property the limitation of jurisdiction of this Court is that such land or immovable property must be situate within its jurisdiction. Regarding the second class of suits other than those for land and immovable property the first limitation is that the cause of action must arise wholly within its jurisdiction. Then this clause deals with those cases where part of the land or part of the cause of action is outside the jurisdiction of this Court. It is here that the leave of this Court has first to be obtained before the suit can be instituted in this Court, with the one exception where the defendant at the time of the suit dwells or carries on business or personally works for gain within the jurisdiction of the Court.

A close scrutiny of this clause, therefore, reveals that there are certain total and absolute jurisdictions of this Court. They are where the whole of the land or immovable property is situate within its jurisdiction when the suit is for such land or immovable property. That is also the case where the whole of the cause of action arises within the jurisdiction of the Court in suits other than suits for land and immovable property. Also that is the case in such cases where the defendant at the time of the institution of the suit dwells or carries on business or personally works for gain within the jurisdiction of this Court irrespective of the fact where the cause of action arises. These

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three are the categories of total and absolute jurisdiction of the Court under the grant of power in clause 12 of the Letters Patent. No question of the litigant having to take the leave of the Court arises in these three cases. So long as the litigant satisfies the test laid down in these three cases his right to institute the suit in this Court is absolute and unfettered. The court can neither assume nor renounce such jurisdiction.

But then there is another class of jurisdiction which this Court can avail under clause 12 of the Letters Patent where the realty or the cause of action is not wholly but only partly within its jurisdiction. It is an inchoate jurisdiction which comes into action upon the Court granting the leave to institute the suit. It is the nascent jurisdiction which lies dormant in this Court and can only be put into life and operation by an act of the Court in granting leave to institute the suit. No act of the Court is necessary to assume jurisdiction in those three cases which I have just described where the jurisdiction is total and absolute. There the Court in its inception is invested with jurisdiction. But here the Court has to acquire it. Here the jurisdiction does not depend only on the fact of the Court but also on the act of the Court.

The principle that is recognised in clause 12 of the Letters Patent is to limit such assumption of jurisdiction where in suits for land or immovable property the subject matter, the land or the immovable property or in other suits the cause of action is partially but not wholly within its jurisdiction. The reason behind this principle is not far to seek. When a part only of the whole cause of action arises within the jurisdiction of the Court, the result is that no one Court can claim to have jurisdiction over the whole cause of action. In such a case the competition between Courts and the multiplicity of proceeding involved therein are not only resolved but also the incapacity of any one Court to deal with the entire cause of action is removed by this device of granting to this Court the power to give leave to the litigant to institute the suit and thus assume jurisdiction over the entire cause of action.

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In performing this act of granting leave and assuming jurisdiction, the Court performs a judicial function according to its discretion. The discretion comes in because the Court has to consider whether it will grant its fiat or leave to the plaintiff's choice of this forum although only part of his cause of action has arisen here. The plaintiff ordinarily is *dominus litis*. But where part of his cause of action arises within the jurisdiction of this Court, he has no absolute right of the choice of forum because his choice has to be backed up by the sanction and leave of this Court. That is why the Court has to exercise its discretion and no doubt such discretion has to be exercised on judicial principles and not arbitrarily. The Court, however, is always handicapped by the fact that this order of granting leave and thus assuming jurisdiction is normally and for practical reasons *ex-parte* and is based only on the materials as placed in the plaint and nothing else. But when the defendant comes and appears and points out to the Court that while a part of the cause of action has arisen within the jurisdiction of this Court, yet the other parts of the cause of action are so significant that they having arisen outside the jurisdiction of the Court, the place where such significant parts of the cause of action had arisen is the more proper forum for trial of the action, then the Court will re-consider its act of the grant of leave and assumption of jurisdiction. It does so on the principle that no act of Court *ex-parte* should cause avoidable harm or prejudice to a litigant. That is the reason why the Court considers the balance of convenience in determining whether it should abide by its *ex-parte* act of grant of leave and assumption of jurisdiction when on fuller materials it finds that such assumption of jurisdiction will cause harm and prejudice and necessarily inconvenience to the defendant. If it so finds, then it will renounce its act of jurisdiction and allow the parties to go to the most convenient forum for trial. Wherever a cause of action only partially arises within the jurisdiction of one Court, there is implicit competition regarding the convenience between more than one Court. Inherent in a situation where parts of one cause of action arise at different places is the unavoidable problem of choice between courts of these different places. Inevitable in such a choice is the question of convenience of one

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place over another. *Ex hypothesi* the situation is such that no one place has the monopoly of the conveniences and the choice of any one forum is bound to cause some inconvenience or other. Therefore the balance of competing conveniences has to be determined not by hair-splitting arguments but broadly. That is the reason why the Court looks at the substantial convenience and not the subtle convenience to find out the place where such substantial convenience lies for the purpose of trial. If it does not lie in this place where part of the cause of action arose and for which the Court granted leave and assumed jurisdiction under Clause 12 of the Letters Patent, then this Court will revoke the leave and relegate the parties to that forum where substantial convenience lies.

Where cause of action is transitory and ambibious in the sense that parts of one cause of action arise in different places, the jurisdiction of the Courts at any one of such places is in essence tentative. When this Court grants exparte leave under Clause 12 of the Letters Patent to a plaintiff on the ground that only a part of his cause of action has arisen within the jurisdiction of this Court, it acquires a tentative jurisdiction over the entire cause of action but such tentative jurisdiction is liable to exception by the defendant on the ground of the balance of convenience or the analogous grounds which also come under the doctrine of conveniences, namely, that the choice of this forum under Clause 12 by the plaintiff has been vexatious, oppressive, malicious or harassing. Choice obtained under the fiat of this Court by leave under Clause 12 of the Letters Patent where only a partial cause of action has arisen within the jurisdiction of this Court is a replaceable choice and does not represent an irretriveable act of jurisdiction by this Court. That is the difference between absolute jurisdiction of the Court with which it remains invested *ab initio* and the qualified jurisdiction of the Court which it creates for itself and acquires in individual cases by its own act of granting leave.

Before concluding this discussion on Clause 12 of the Letters Patent when a part of the cause of action arises within the jurisdiction of this Court, it may not be out of place, for drawing

the contrast, to notice Section 20 of the Civil Procedure Code where the Court is given absolute jurisdiction in sub-clause (c) thereof even where a part of the cause of action arises and where therefore no leave of the Court is required by a litigant to institute his suit. The Civil Procedure Code by its Section 20(b) insists on the leave of the Court only in the case where among the defendants some reside outside and some within the jurisdiction of this Court unless the outside defendant acquiesces in such jurisdiction.

That is how I understand the principle of the balance of convenience and these are the reasons which, to my mind, are justifications for the Court considering the balance of convenience in granting and revoking leave under Clause 12 of the Letters Patent. The subject matter of the suit, parties to the suit, witnesses required for the proof of the respective cases of the plaintiff and the defendant, expenses of trial are, among others, all relevant subjects while the Court considers the balance of convenience in a particular case.

Broadly speaking, in the case before me, having regard to the fact, that the plaintiff company itself carries on its undertaking at Muttra, that the service rendered by the defendant is at Muttra, that his main work is at Muttra, that all the alleged acts of insubordination and prejudice to the company are at Muttra, I have no hesitation in holding that the balance is entirely in favour of this dispute being litigated at Muttra. There is no question of any bad faith or abuse of the processes of this Court in this case. The plaintiff has its head office here within the jurisdiction and with leave under Clause 12 of the Letters Patent it could file its suit in this Court. But in exercising my jurisdiction after consideration of the balance of convenience of the parties in this case, I have come to the conclusion that such balance is in favour of the defendant's contention.

For these reasons, I revoke the leave granted under Clause 12 of the Letters Patent and direct that the plaint be taken off the file and give liberty to the plaintiff to present such plaint at the proper and convenient forum with such modifications as the plaintiff may be advised.

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There will, therefore, be an order in terms of clauses (a) and (b) of the Summons. Having regard to the nature of the allegations, I do not propose to make any order as to costs of this summons. I however certify the Chamber Summons to be fit for the employment of counsel.

P.K.R. *Application granted.*

B. N. Nandy: Solicitor for the Applicant-Defendant.

M. G. Poddar: Solicitor for the Respondent-Plaintiff.

ORIGINAL CIVIL.

Before Mr. Justice R. S. Bachawat.

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December, 6.

SPICES (INDIA) LTD.

v.

ASIATIC STEAM NAVIGATION CO. LTD.*

Bill of Lading—Document of title—Effect of transfer by endorsement—Carrier's liability.

Bill of Lading containing a clause providing that "one of the parts being accomplished the others are to stand void"—Must be drawn up in a set and the original and its counterparts must bear proper stamp duty.—Article 14, First Schedule, Indian Stamp Act.

Bill of Lading not drawn up in a set—Original lost—Carrier refusing delivery on production of copy of Bill of Lading—Proper indemnity and guarantee—Breach of contract—Carrier's liability—Limitation.

Bill of Lading if negotiable instrument—Order 7 Rule 16 of the Code of Civil Procedure—Nature of reliefs in suits on lost Bill of Lading—Claim in equity, if entitles plaintiff to damages.

A Bill of Lading is a document of title transferable by endorsement and such transfer has the effect of delivery of the goods. A carrier has the right to refuse delivery to the consignee if the Bill of Lading is not

* Original Side Suit No. 3128 of 1952.

produced as, without its production, the carrier's liability is not discharged where the consignee is not the true holder of the Bill of Lading.

Where the original Bill of Lading containing a clause providing that "one of the parts being accomplished, the others are to stand void" is drawn up in a set and the original as well as the counterparts are properly stamped under Article 14 of the First Schedule of the Indian Stamp Act and signed, there is only one such Bill though drawn up in different parts and delivery to a person presenting one part discharges the carrier acting in good faith.

Where the Bill of Lading is not drawn up in a set and the original is lost, the carrier can reasonably ask for indemnity and guarantee when a copy of the Bill of Lading is produced for taking delivery—there is no tortious act or breach of contract if the carrier refuses delivery in such cases if no indemnity or guarantee is furnished. As the carrier's liability to third persons is limited to one year under Article 31 of the Indian Limitation Act, the carrier may reasonably ask for a guarantee for one year.

In a suit upon a lost Bill of Lading no relief is available to the plaintiff under the provisions of Order 7 Rule 16 of the Code of Civil Procedure as a Bill of Lading is not a negotiable instrument. In such actions, however, relief can be granted in equity but no damages can be awarded as equity does not award damages.

Suit for a declaration that the Plaintiff is entitled to immediate possession and delivery of certain goods.

The material facts will appear from the Judgment.

B. K. Ghose for the Plaintiff.

Sankar Ghosh for the Defendent.

The Judgment of the Court was as follows:

R. S. Bachawat, J.:—This is a suit for a declaration that the Plaintiff is entitled to immediate possession and delivery of certain goods, decree for delivery of the goods and for consequential reliefs.

355 bags of turmeric were shipped from Maslipatam to Calcutta per Steam Ship "Narani" belonging to the defendant under the bill of lading No. 6 dated June 5, 1952. Messrs V. R. P. Vankatasaroa were the consignors and the Plaintiff was the consignee of the goods.

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The original bill of lading and a copy thereof both signed by the agent of the defendant were received by the consignor through their brokers on June 9, 1952. On the same date the consignors sent the original bill of lading to the Plaintiff by Post. The original bill of lading was lost in course of transmission and did not reach the Plaintiff. The goods arrived in Calcutta sometime in June 1952. On receipt of a telegram from the Plaintiff the consignors sent their Sales Manager, Radha Krishna Murthi, to Calcutta with the copy of bill of lading. Sometimes the 2nd or 3rd week of June 1952 the copy of bill of lading was tendered to the defendant by the Plaintiff through one Radha Kissan who offered indemnity and a bank guarantee for 3 years to Mr. Fountain acting on behalf of the defendant. Mr. Fountain refused to deliver the goods without an indemnity and bank guarantee for 6 years.

By letter dated July 3, 1952. Messrs. Fox and Mondal. Attorneys for the Plaintiff, demanded from the defendant delivery of the goods and referring to the above interview stated that the plaintiff offered to sign an indemnity bond agreeing to indemnify the defendant against all future claims in respect of the goods accompanied by bank guarantee but the defendant refused to accept the offer and was wrongfully insisting that the bond and the guarantee should be for unlimited amount and for a period of 6 years. They added that the plaintiff considered this to be very unreasonable as the claim could not possibly exceed the value of the goods and would be time-barred after one year. By letter dated July 5, 1952, the defendant wrote to Messrs. Fox and Mondal stating that there was some misunderstanding as to the verbal talks and that the defendants were agreeable to give delivery of the goods against an indemnity and Bank guarantee for 6 years limited to the value of the goods. By letter dated July 9, 1952, Messrs. Fox and Mondal wrote to the defendant stating that the plaintiff was prepared to sign an indemnity limited to the value of the goods but that the plaintiff did not see why a guarantee by a Bank and that too for 6 years was required. By letter dated July 11, 1952, the defendant wrote to Messrs. Fox and Mondal stating that the defendant was not unreasonable and referred to the opinion of an English Counsel

to the effect that the period of limitation is 6 years. By letter dated July 21, 1952, Messrs. Fox and Mondal pointed out that the opinion based on English law had no application to India and stated that in order to get the goods quickly the plaintiff was prepared to sign an indemnity bond for 6 years provided that there was no further question of obtaining a Bank's guarantee. By letter dated July 27, 1952, the defendant wrote to Messrs. Fox and Mondal stating that the defendant could not agree to forego the Bank's guarantee and that unless the plaintiff agreed to sign a letter of guarantee for 6 years with a Bank's guarantee the defendant would consider the correspondence closed. The suit was instituted on or about August 4, 1952. Notice of motion for appointment of Receiver of the goods was taken out on behalf of the plaintiff on or about August 5, 1952. By an order dated August 13, 1952 this Court appointed a Director of the Plaintiff Company Receiver of the goods subject to his furnishing security of Rs. 11,000/-. to the satisfaction of the Registrar and directing that upon the Security being furnished the defendant was to make over the goods to the Receiver and the Receiver was to sell the goods.

The following issues were raised at the trial.

ISSUES.

1. Was the plaintiff at all material times the owner of the goods mentioned in Paragraph 1 of the Plaint?

2. Was the plaintiff at all material times the holder for value of the bill of lading in respect of the said goods?

3. Did the plaintiff produce a counterpart or duplicate of the said bill of lading as alleged in Paragraph 4 of the Plaint? If so, was the defendant bound to deliver the said goods to the plaintiff?

4. Was the defendant guilty of breach of contract or breach of duty or of negligence in not delivering the said goods to the plaintiff?

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5. Was the defendant bound to deliver the said goods to the plaintiff on its furnishing reasonable indemnity? If so, did the plaintiff furnish reasonable indemnity?

6. To what reliefs, if any, is the plaintiff entitled?

Issues Nos. 1 and 2. Must be answered in the affirmative. I am satisfied that the plaintiff was the owner of the goods and the holder of the bill of lading.

Issues Nos. 3, 4, 5 and 6. The relevant clauses of the bill of lading are as follows: The opening part states:

"Shipped in apparent and good order and condition by Messrs. Vallopalli Raghaviah Pothinani on the Ship S.S. "Narani" now lying at the Port of Musalipatam 355 bags Turmeric to be delivered subject to the terms and conditions hereof at the Port of Calcutta or so near thereto as she may safely get unto Messrs. Spices (India) Ltd. or assigns . . . . . ."

Clause 2 states that the carrier is not a common carrier.

Clause 12 provides that "one copy of this bill of lading is to be given up in exchange for the goods or a delivery order therefor."

The witnessing part state: "In witness whereof the Master or Agent of the said Ship has affirmed to one bill of lading, all of this tenor and date, one of which being accomplished the others to stand void."

It is well settled that the carrier is entitled to refuse delivery of the goods to the consignee if the bill of lading is not produced. See *Glyn Mills Currie & Co.* v. *The East and West India Dock Co.* (1). A bill of lading is a document of title transferable by endorsement and its transfer has the same effect as the delivery of the goods. The delivery of the goods to the consignee without production of the bill of lading does not discharge the carrier

(1) (1882) 7 A.C. 591 at 598.

where the consignee is not the true holder of the bill of lading. *The Stettin* (1).

Where a bill of lading is drawn in a set there is really one bill of lading though drawn in different parts. Where such bill of lading contains a clause providing that one of the parts being accomplished the others are to stand void, delivery to a person presenting one part discharges the Ship owner acting in good faith without notice of any defect in his title. See *Glyn Mills Currie & Co.* v. *The East and West India Dock Co.* (2), and tender of one part of the bill of lading is for certain purposes as effectual as tender for Bill of lading. *Sanders* v. *Mctlean* (3), where a bill of lading is drawn in a set. Two or three or four parts of it are made out and signed. Sometimes one part is marked original and others are marked duplicate. Sometimes the parts are numbered first, second and third consecutively. The number of parts made out is shown in the witnessing clause of the bill of lading.

By Article 12 of the first Schedule of the Stamp Act, a bill of lading must be stamped and if a bill of lading is drawn in parts, the proper stamp therefore must be borne by each one of the set. In this case the original bill of lading is properly stamped but the copy bears no stamp.

The bill of lading No. 6 dated June 5, 1952, contains the clause. "In witness where of the Master or Agent of the said Ship has affirmed to one bill of lading all of this tenor and date, one of which being accomplished the others to stand void." The word "one" is typed and the rest of the clause is printed. The word "one" clearly shows that only one part of the bill of lading was made out and that the bill of lading was not drawn in a set. The clause "all of this tenor and date, one of which being accomplished the others to stand void," is strictly appropriate when the bill of lading is drawn in more than one part and must be treated as surplus when only one part is drawn Absence of stamp on the copy of bill of lading also indicates that it is not apart of a bill of lading drawn in a set.

(1) (1889) L.R. 14 P. 142.
(2) (1882) 7 A.C. 591.
(3) (1883) 11 Q.B.D. 327.

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The defendant, therefore, could not safely delivery the goods to the plaintiff on production of the copy of the bill of lading.

Clause 12 provides that one copy of the bill of lading was to be given up in exchange for the goods or a delivery order thereof. In my opinion, this provision is inserted for the protection of the Ship owner who is entitled to require delivery of one copy of the bill of lading in exchange of the goods.

This clause does not entitle the holder of the bill of lading to obtain delivery of the goods on production of a copy of the bill of lading.

Refusal by the defendant to deliver the goods was, therefore, not a breach of the contract nor was it a tortious act. The plaintiff must seek his remedy, if any, in the equitable jurisdiction of the Court.

At common law, an action on a lost negotiable instrument was not maintainable even though an indemnity was tendered to the defendant. See *Hansard* v. *Robinson* (1). This rule was altered by statute. In this country Order 7 Rule 16 of the Code of Civil Procedure gives the Court statutory power to grant relief to the plaintiff suing on a lost negotiable instrument where an indemnity against claims on the instrument is given by the plaintiff, to the satisfaction of the Court. In a proper case the Court may be satisfied with a personal indemnity only. *King* v. *Zimmerman* (2). Formerly common law also gave no relief when an instrument under seal was lost but subsequently, production of the document in an action upon the instrument was dispensed with at common law. Equity, however, always gave relief in case of accidental loss of an instrument sued upon. Equity imposes suitable terms and if necessary requires an indemnity. The condition of relief varies with the nature of the instrument and the circumstance of the case. Thus an indemnity is not required in equity if the lost instrument is an

(1) (1827) 7 B. & C. 90.

(2) (1871) L.R. 6 C.P. 466.

Insurance policy: *England* v. *Lord Tredegar* (1). In *King* v. *Zimmerman* (2), where no indemnity was offered before the commencement of the action of a lost negotiable instrument the Court required the plaintiff to pay the costs of the action as a condition of relief under Section 87 of the Common Law Procedure Act 1854 being a provision analogous to Order 7 Rule 16 C.P.C. where complete indemnity is offered before suit, the title of the Plaintiff to equitable relief may be complete.

Learned counsel on both sides was unable to refer to any reported case in which the question of relief in the case of accidental loss of a bill of lading was discussed. My attention was drawn to *Carlberg* v. *Wemyss Coal Co. Ltd.* (3), where the Court of Sessions in Scotland seems to have decided that if the consignee is unable to produce the bill of lading when the Ship is ready to discharge, the refusal by the carrier to discharge the cargo may in certain circumstances disentitle the carrier from claiming demurrage. This case is referred to in Carver's Carriage of Goods by Sea, 9th Edition; 726, Scrutton on Charter Parties, 18th Edition 328 and British & Empire Digest, Volume 41; 513 foot-note, but the report of the case is not available.

A bill of lading is not a negotiable instrument and therefore Clause 7 Rule 16 of the Code of Civil Procedure has no application. The question whether the plaintiff suing on a lost bill of lading is entitled to relief in equity and if so, on what terms must be decided on general principles on which the Courts of Equity grant relief. Quite clearly the holder of a lost bill of lading is entitled to relief in equity. At the same time the carrier is entitled to complete protection and indemnity against adverse claims. A bill of lading is a document of title transferable by endorsement and delivery of the goods to a wrong person without its production does not discharge the carrier from liability to the true holder of the Bill of Lading. The carrier may, therefore, ask for an indemnity against adverse claims and may also demand that the indemnity be secured e.g. by reasonable bank guarantee.

(1) [1866] L.R. 1 Eq. 344.
(2) (1871) L.R. 6 C.P. 66.
(3) [1915] S.C. 616.

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By article 31 of the Indian Limitation Act, the period of limitation for a claim against a carrier for compensation for non-delivery or delay in delivery of the goods is one year from the date when the goods ought to be delivered. The article applies to all claims for compensation against the carrier for non-delivery and delay in delivery whether the suit is founded on breach of contract or on tort. The carrier may reasonably ask for a bank guarantee for the period of one year from the date when the goods ought to be delivered. The carrier is protected by the Limitation Act from liability to third persons after the expiry of the period of limitation. *Prima facie* it is not reasonable for the carrier to ask for a bank guarantee for six years.

The plaintiff in this case was always ready and willing to give an indemnity. At the first interview between Sri Radha Kissen and Mr. Fountain bank guarantee for 3 years was offered by the plaintiff. By letter dated July 5, 1952, the defendant demanded bank guarantee for six years. Messrs. Fox & Mondal by their letter dated July 9, 1952, enquired as to why the defendant was demanding a bank guarantee and that too for six years and by letter dated July 21, 1952 enquired if there was any question of Bank guarantee in view of the offer of indemnity for 6 years. By letter dated July 22, 1952, the defendant unequivocally refused to deliver the goods without 6 years' bank guarantee. The defendant, relying upon the English law, contended that the period of limitation is 6 years. English law, of course, has no application and the period of limitation in this country is 1 year. In my opinion the defendant acted unreasonably in refusing to deliver the goods without a bank guarantee for six years.

The plaintiff is the owner of the goods and the holder of the bill of lading. More than 29 months have expired since the date when the goods ought to have been delivered and the period of limitation for adverse claims has expired long ago. During this long period, there has been no adverse claim by a third party. Having regard to these circumstances, it is no longer necessary to require execution of a formal indemnity

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and a bank guarantee by the plaintiff. The plaintiff is entitled to a declaration that it is the owner of the goods. At the commencement of the tiral, the plaintiff's council stated that the Receiver had taken possession of the entire goods. During argument it was stated by the plaintiff's counsel and admitted by learned counel for the defendant that 7 bags of turmeric were still lying with the defendant. It was then asserted by the plaintiff's counsel and denied by the defendant's counsel that the defendant had refused to deliver the goods. If there was any refusal to deliver the goods, that question has not been investigated at the trial. It is too late for the plaintiff to contend that the defendant wrongfully refused to deliver 7 bags of turmeric to the Receiver and is liable for consequential deterioration on account of such wrongful refusal. The plaintiff is entitled to delivery of 7 bags of turmeric in the condition in which they are now.

The plaintiff claims damages for deterioration and demurrage and an enquiry into such damages. It was agreed by learned counsel for the plaintiff that the quantum of damages will not form the subject matter of the investigation at the trial and that the Court should order an enquiry as to damages if the court decides that the plaintiff is entitled to damages. If I came to the conclusion that the plaintiff is entitled to damages. I would have awarded to the plaintiff damages for deterioration, if any, sustained and demurrage, if any, incurred between July 22, 1952 and August 13, 1952. In my opinion, the plaintiff is not entitled to such damages.

The plaintiff claims relief in enquiry. Enquity however only gives an account of profits and does not award damages. In Halsbury's Laws of England 2nd Edition, Volume 13, Article 76 page 81 the law is stated thus:

> "The principle underlying relief at law is that the plaintiff has suffered loss by the breach of contract or wrongful conduct of the defendant, and damages are awarded for the purpose of making good this loss. The principle underlying relief in equity is that the defendant has improperly received or withheld property. or profits from property—such property or profits belonging to the plaintiff—and he is required to restore the property, or to

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account for the profits. Thus at law the extent of the remedy is measured by the damages awarded; in equity the extent of the remedy is measured by the gain to the defendant, and this is ascertained by directing an account against him. These two measures may have quite different results."

The defendant has not made and is not withholding any profits. The plaintiff may have suffered loss on account of deterioration and demurrage but equity will not give him damages for such loss.

With regard to costs the defendant acted unreasonably in asking for a bank guarantee for 6 years. The title of the plaintiff to equitable relief was complete before suit and the litigation was caused by the unreasonable demand of the defendant. The defendant also unreasonably denied in the written statement that the plaintiff was the consignee named in the bill of lading. It must at the same time be borne in mind that the plaintiff has lost with regard to its claims regarding deterioration and demurrage. The justice of the case should be met by directing that the plaintiff should get one half of the costs of the suit and also the costs, charges and expenses, if any, of the Receiver. I pass the following decree:

There will be a declaration that the plaintiff is the owner of the goods mentioned in paragraph 1 of the plaint.

The Receiver appointed in this suit will be at liberty to pay to the plaintiff the sale proceeds of the goods of which he has taken possession. The Receiver will be discharged subject to his filing final accounts. The defendant is directed forthwith to deliver to the plaintiff 7 bags of turmeric belonging to the plaintiff and now lying with the defendant in the condition in which they are now. It is declared that the plaintiff is not entitled to make any claim on account of deterioration of the said goods.

There will be a decree in favour of the plaintiff for (a) one half of the costs of this suit and (b) costs, charges and expenses, if any, of the Receiver, including the costs, if any, of furnishing security.

P.K.R. *Suit decreed.*

Fox & Mondal: Solicitors for the Plaintiff.

Orr, Dignam & Co.: Solicitors for the Defendant.

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Before Mr. Justice P. N. Mookerjee and Mr. Justice S. N. Guha Ray.

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UNION OF INDIA AS REPRESENTED BY THE EAST INDIAN NOW THE EASTERN RAILWAY ADMINISTRATION.

v.

MESSRS. GURJAT TOBACCO CO. & ORS.*

Claim against Railway—Protection under Risk Notes—Misconduct—Notice under Section 77 of the Indian Railways Act—Substantial justice—Interference under discretionery revisional powers of the High Court—Limitation—Section 15(2) and Article 130 of the Indian Limitation Act—Onus of proof of starting point of limitation—When the date of delivery becomes the starting point of limitation.

Even if there are technical grounds in favour of the petitioner, if substantial justice has been done to the parties, the High Court will not interfere with the decision of the Subordinate Court.

Though there is a conflict of decisions as to what constitutes misconduct on the part of the Railway which may have to be considered by a Full Bench in an appropriate case, where the decision of Court below accords with substantial justice, the High Court in its discretionery revisional jurisdiction will not interfere with such order.

Service of notice under Section 77 of the Railway Act upon the Chief Commercial Manager is substantial compliance with law as such notice is not a condition precedent to filing a suit. In matters of this nature the Court ought not be too technical or hypercritical so as to hinder justice and not further it, by insisting upon strict technicalities.

Limitation for suits against carriers is one year under Article 30 of the Indian Limitation Act and where notice under Section 80 of the Code of Civil Procedure has to be served the plaintiff is entitled to a further period of two months under Section 15(2) of the Act.

Under Article 30 of the Limitation Act, limitation runs from the date "when the loss of injury occurs." As such loss or injury obviously occurs

* Civil Rule No. 1555 of 1952 against the Order of the Subordinate Judge, Burdwan (exercising the powers of S. C. C. Judge) passed in S. C. C. Suit No. 134 of 1951 dated 8-4-1952.

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while the goods are in the custody of the Carrier, *prima facie*, the date of such loss or injury is within the special knowledge of the carrier. Accordingly under Article 30 the onus to prove such date of loss or injury, where the goods are carried by rail and the loss occurs in course of transit, is upon the Railway concerned. If the Railway fails to discharge this onus date of delivery of the goods to the party should be taken as the relevant date of loss or injury.

Application under Section 115 of the Code of Civil Procedure by the Defendant, Union of India as representing the East Indian now the Eastern Railway Administration.

The material facts will appear from the judgement.

Bhabesh Narayan Basu for the Petitioner.

S. C. Janah and Bankim Ch. Ray for the Opposite Parties.

The judgment of the Court is as follows—

P. N. Mookerjee, J.:—*This Rule is directed* against a decree passed by the learned Subordinate Judge of Burdwan in Small Cause Court Suit No. 134 of 1951 allowing in part the plaintiff's claim for compensation against the defendant Railway. The claim arose out of damages alleged to have been caused to a part of a consignment of Biri tobacco booked at Station Vadtal for carriage and delivery to the plaintiffs at Burdwan. The booking was under Risk Notes A and B and the usual defences were taken by the petitioner Railway denying misconduct, claiming protection under the Risk Notes and alleging non-service of the statutory notices. It was further pleaded that the plaintiffs' claim was excessive and was also barred by limitation. The learned Subordinate Judge overruled the defence contentions and decreed the plaintiffs' suit. He, however, disallowed the plaintiffs' claim for interest. Against the decree passed as aforesaid, the defendant Railway obtained the present Rule.

In support of the Rule, Mr. Bhabesh Narayan Basu urged three points. He challenged the finding of the learned Subordinate Judge on the question of misconduct, contended also that there was no proper service of notice under section 77 of the

Indian Railways Act and finally that the plaintiff's suit was time-barred.

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Upon the first point, Mr. Basu drew our attention particularly to the decision of this court in the case of *Ralliaram Dingra* v. *The Governor General of India in Council* (1), and submitted that in the light of the observations contained in that judgment the learned Subordinate Judge's finding against the petitioner on the question of misconduct could not be sustained. On the above basis Mr. Basu claimed full protection for his client against the plaintiff's claim, made in the suit, under the Risk Notes, referred to above.

It was next argued by Mr. Basu that there was, in the present case, no proper service of notice under section 77 of the Indian Railways Act. It was not and, indeed, it could not be denied that a notice under that section had been sent to the Railway in time but the contention, put forward by Mr. Basu, was to the effect that as it was sent to the Chief Commercial Manager and not to the General Manager, the service was not a proper service in law. For this proposition strong reliance was placed on the recent decision of this court reported in *Union of India* v. *Indumati Saha* (1).

The Petitioner's third contention was that, in any event, the plaintiff's claim was barred by limitation, the suit having been instituted on the 5th November, 1951 although delivery was taken by the plaintiffs opposite parties on the 1st September, 1950. On this plea of limitation Mr. Basu's argument was that the Article of the Limitation Act applicable to the present case being admittedly Article 30 which allowed a period of one year, from the date "when the loss or injury" occured, that is, one year from the date of delivery to the plaintiffs, at the latest, for institution of the suit, the time for such institution in the present case expired, in the first instance, on the 1st of September, 1951 at the latest, and, the plaintiffs being entitled to a deduction or extension of two months under section 15(2) of the Indian Limitation Act on account of the statutory notice of suit which

(1) (1944) 48 C.W.N. 554.

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had to be given and was given under section 80 of the Code of Civil Procedure, the very last date of filing the suit was November 1, 1951, but the suit having been filed admittedly on November 5, 1951, it was clearly time-barred.

The points, raised by Mr. Basu, are mainly of a technical character and, although we would not say that all of them are wholly without substance, so far at least as technicalities are concerned, we are not inclined to interfere in this Rule on technical grounds, even if they were in the petitioner's favour, as the plaintiff's claim, to the extent that it has been allowed by the learned Subordinate Judge, appears to be quite a just claim on the merits and as, accordingly, by the decision, complained against in this Rule, substantial justice appears to have been done between the parties.

The learned Subordinate Judge found as a fact that the damage to the tobacco was caused by rain water penetrating through the crevices of the flap doors on both sides of the wagon. He also found that the bags in question were placed by the sides of the flap doors and not away from them by the railway staff although it was known to at least, it ought to have been realised—by the railway authorities that rain being usual at the time of the year when the consignment was being carried, the tobacco was likely to be damaged by rain water if placed near the flap doors. On these findings, the learned Subordinate Judge held the Railway guilty of negligence amounting to misconduct and disentitling them to any protection under the Risk Notes.

It was urged before us that the negligence, found above, would not satisfy the test of misconduct as laid down in the case cited *Ralliaram Dingra* v. *The Governor General of India in Council* (1), Judicial opinion on this point is not, however, uniform and the learned Judge's finding of misconduct appears to be well founded on the tests laid down in that behalf in the other Bench decision of this Court reported in *The Bengal Nagpur Railway Co.*, v. *Moolji Sicka & Co.* (2) and it is also sub-

(1) (1944) 48 C.W.N. 554.
(2) (1930) 35 C.W.N. 133.

stantially supported by the cases of *B. N. Railway Co., Ltd.* v. *Mooji Sika & Co.* (1), and *Bengal Nagpur Railway Company Ltd.* v. *Messrs. Haji Latif Abdulla* (2). There is much to be said in favour of either point of view and, in a proper case, the question may have to be considered by a Full Bench of this Court. As however, as we have already said, the learned Subordinate Judge's decision has at least the merit of substantial justice, it is unnecessary for us in this Rule to discuss this point any further or to consider the question of reference of the conflict of judicial opinion to a Full Bench, and we would content ourselves by refusing to give effect to the petitioner's above contention in this case simply on the ground that, even if it be technically correct, it would hardly justify interference with the learned Subordinate Judge's decision, which plainly accords with substantial justice, in the exercise of the discretionary revisional powers of this Court.

Upon the second contention too the position is substantially similar. We have said above that the notice under section 77 of the Indian Railways Act was served upon the Chief Commercial Manager. Such service has been accepted as good service in the decisions of this court reported in *Shamsul Huq* v. *Secretary of State* (3), and in *Sristhidhar Mandal* v. *Governor General in Council* (4), and also by the Allhabad High Court in the case of *Chaturbhuj Ram Lal* v. *Secretary of State for India* (5), broadly upon the view, *inter alia,* that as claims against the Railway are dealt with by that Officer service of this notice of claim upon him must be taken to be substantial compliance with the requirements of law. In the case of *Sristhidhar Mandal* v. *Governor General in Council* (4), where also the notice under section 77 was served upon the Chief Commercial Manager, Henderson J. put the matter straight in his own inimitable language. "The law is certainly remarkable" so remarked the learned Judge. "If a good claim is to be dismiss-

(1) [1932] A.I.R. Calc 70
(2) [1937] A.I.R. Calc. 410.
(3) (1930) I.L.R. 57 Calc. 1286; S C., [1930] A.I.R. Calc. 332.
(4) [1945] A.I.R. Calc. 412.
(5) [1927] A.I.R. All. 215.

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ed, because a notice is given to the Officer whose duty it is to investigate it and he proceeded to hold that notice was given to the right officer 'and' it would be an extraordinary thing if that is held to be an invalid notice. Continuing the learned Judge made the following observations at page 413 of the Report." The service of a notice under section 77 is not a condition precedent to the institution of the suit. Section 140 was undoubtedly enacted to help claimants and not to assist the railway administration to make a dishonest defence. If the notice is served within its terms the Railway have no answer. It does not matter in the least whether any individual officer knew about it or not. It is however sufficient to comply with section 77 if in fact notice is given to the railway administration. The notice under section 80, Civil Procedure Code, was duly served on the Government of India. As usual it was forwarded to the General Manager of opposite party No. 3. He did nothing whatever except to send it to the gentleman who received the notice under section 77 from the petitioner direct. It is quite obvious that, if the notice under section 77 had been sent to the General Manager, he would merely have forwarded it to the Chief Commercial Manager. In these circumstances, it would be preposterous to say that no notice has been given to he Railway administration." That sums up admirably the gist of the position, taken up by the learned Judge, on this aspect of the matter and it is difficult to say that there is no substance in his supporting observations. A contrary opinion has no doubt been expressed in the recent decision of this court in the case of *Union of India* v. *Indumati Saha* (1), enjoining strict such compliance with the statute in matter of such service and recognising the General Manager alone as the appropriate authority to be served with notice under section 77. We are not prepared to say, however, without a fuller consideration that the earlier view is in law totally unacceptable. It has, at least, all the commonsense of the matter from a practical point of view and as the purpose of the statutory notice is sufficiently and unquestionaly served by service upon the Chief Commercial Manager he being the authority who actually deals with claims against the Railway's act "is not" as distinguished from the other statutory notice under section 80 of the Civil Procedure Code "a condition pre-

(1) (1951) 55 C.W.N. 662.

cedent to the institution of the suit," as held by Henderson J. in the passage quoted and now settled by the Full Bench in the recent case of *Bansi* v. *Governor General of India in Council* (1), Henderson J.'s view on this point was expressly approved and as in matters of this kind Courts ought not to be too technical or hypercritical so as to hinder the cause of justice, and not further it, by insisting upon strict technicalities, the decisions in *Chaturbhuj Ram Lal* v. *Secretary of State for India* (2), *Shamsul Huq* v. *Secretary of State* (3), and *Sristidhar Mandal* v. *Governor General in Council* (4), may well be supported, even if strict logic or the letter of the law inclines towards the contrary view. We are satisfied, however, as already stated, that the decision of the learned Subordinate Judge in the present case is quite in consonance with substantial justice and we would not, therefore, interfere with it in revision, even if it were technically not quite correct. The petitioner's second contention also is, accordingly, rejected.

There remains now the petitioner's submission, namely, the point of limitation. The learned Subordinate Judge has rejected this plea of limitation on the finding that the date of delivery of the goods to the plaintiffs opposite parties was the 4th September, 1950. It is contended before us that, in taking the said date as the date of delivery, the learned Subordinate Judge has committed an error it is argued by Mr. Basu that the actual date of delivery in the present case was the 1st or the 2nd September, 1950 and that, therefore, the suit was filed at least a day or two too late. On the materials before us, we are unable to accept this contention. Ex. 2, the shortage certificate, clearly shows that delivery was taken by the plaintiffs opposite parties on the 4th September, 1950. It seems to us further that the different dates, mentioned in Exs. A and B, the Railways delivery Book and Unloading Book, do not either refer to or give us clearly the date of delivery to the plaintiffs. That this is so is well-confirmed, and, indeed, placed beyond doubt or

(1) (1951) 56 C.W.N. 83—89.
(2) [1927] A.I.R. All. 215.
(3) [1930] A.I.R. Calc. 332.
(4) (1945) A.I.R. Calc. 412.

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dispute, by the pleadings in the case. In the plaint it was specifically stated in paragraph 4 that the delivery was made to the plaintiffs on the 4th September, 1950. This was not controverted in the written statement. In the above state of things, it is idle to contend that the learned Subordinate Judge was wrong in taking the 4th September, 1950 as the relevant date of delivery and, that being so, there is no substance in the petitioner's contention that the plaintiff's suit was time-barred. In the view, we have just expressed, it is unnecessary for us to consider the other argument on this point, advanced by Mr. Janah, who appeared before us on behalf of the opposite parties, that, in any event, Ex. 4 contains an acknowledgment, sufficient in law to give a fresh start of limitation. We may point out, however, that, apparently, at least, this argument has the support of the decision of the Bombay High Court in the case of *Haji Ajam* v. *Bombay and Persia Steam Navigation Co.* (1) and also this Court's decision in the recent case of *Jainarain* v. *The Governor-General of India* (2), and may thus possibly save the plaintiffs suit from being time-barred. As already stated, however, it is not necessary for us to consider this last question in the present case and we do not, therefore, propose to examine Mr. Janah's argument on this point any further. The relevant date of delivery, as correctly taken by the learned Subordinate Judge, being the 4th September, 1950. the statutory period of one year under Article 30 of the Limitation Act—which, as we shall presently show, started to run in the present case from the said date of delivery would take us to the 4th September, 1951, and the plaintiffs being clearly entitled to a further period of two months under section 15(2) of the Limitation Act on account of the statutory notice of the suit under section 80 of the Code of Civil Procedure, the last date for the filing of the suit would be the 4th November, 1951, which being, admittedly, a holiday, as found by the learned Subordinate Judge, the suit must be held to have been properly filed on the 5th November, 1951, quite within the time allowed by law. The petitioner's plea of limitation is, accordingly, overruled.

(1) (1902) I.L.R. 26 Bom. 562

(2) [1951] A.I.R. Calc. 462; (1949) 4 D.L.R. Calc. 225.

It only remains to add that, in the present case, it is not possible to argue that limitation would start earlier than from the date of delivery to the plaintiffs. There is no dispute that Article 30 of the Limitation Act would apply to this case. That Article contemplates suits, "against a carrier for compensation for losing or injuring goods" and under it limitation starts or begins to run from the date "when the loss or injury occurs." Such loss or injury obviously occurs while the goods are in the custody of the carrier and *prima facie,* therefore, the date thereof will be within its special or 'peculiar' knowledge in any event, the carrier will certainly be in a much better position than either the consignor or the consignee to prove that date and, accordingly, it has been held over and over again that, under Article 30 of the Limitation Act, the onus to prove the date of 'loss or injury,' mentioned in the Third Column of that Article, is, where the goods are carried by rail and the loss or injury occurs in the course of such transit, on the Railway concerned, and, in the absence of satisfactory evidence on its part on this point, that, is in the event of its failure to discharge the onus, the date of delivery to the party should be taken as the relevant date of 'loss or injury', or, in other words, as the starting point of limitation under Article 30. This was the view taken in at least three decisions of this court, namely, *Rivers Steam Navigation Co. Ltd.* v. *Biswesvar Kundu* (1), *Gangadhur Ram Chandra* v. *Dominion of India* (2), and *Jainarain's Case* (3), already cited, and also by the Allahabad High Court in *Jugal Kishore* v. *G. I. P. Rly.* (4) and *G. I. P. Rly.* v. *Radhe Mal Manni Lal* (5) and in some of those decisions, it was even spoken of as well-settled. The same view of the law is also to be found in *East Indian Railway & ors.* v. *Gopilal Sharma* (6), where, however, the suit was dismissed as it had been brought beyond one year from the date of delivery of the goods to the plaintiff. That view, namely, what

(1) [1928] A.I.R. Calc. 371.
(2) [1950] A.I.R. Calc. 394.
(3) [1951] A.I.R. Calc. 462.
(4) (1922) I.L.R. 45 All. 43; [1923] A.I.R. All. 22.
(5) (1925) I.L.R. 47 All. 549; [1925] A.I.R. All. 656.
(6) [1941] A.I.R. Calc. 304.

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we have set out before, seems to us to be eminently reasonable and, in our opinion, the law on this point was correctly laid down in the cases cited and the relevant statutory provision was there correctly interpreted.

In the case before us, the petitioner Railway has practically adduced no evidence to show when the damages, which have now been sued for in this suit, and actually proved, had occurred. The Message Book Ext. C is hardly sufficient for the purpose. The onus, therefore, that lay upon the petitioner under Article 30 of the Limitation Act, cannot be said to have been discharged. It may also be pointed out in this connection that, in the petitioner's written statement, there is no allegation that the loss or injury occured at any point of time earlier than the date of delivery to the plaintiffs. In the circumstances, we are bound to hold that, in the present case, the date of delivery to the plaintiffs would be the starting point of limitation and, accordingly, in view of our findings, made above, the petitioner's plea of limitation must fail.

In the result, therefore, all the submissions, made by the petitioner's learned Advocate, are rejected and this Rule is discharged, we direct, however, that in the circumstances of this case, the parties will bear their own costs in this Court.

S. N. Guha Ray, J.:—I agree.

P.K.R. *Rule discharged.*

ORIGINAL CIVIL.

Before Mr. Justice D. N. Sinha.

MASUD ALAM AND OTHERS.

v.

COMMISSIONER OF POLICE & ORS.*

CIVIL.

1954.

January, 14.

Constitution of India, Article 25—Religious faith and belief as distinguished from religious practices—Discrimination in law as distinguished from Executive discrimination—Order of Commissioner of Police prohibiting use of electrical loud speakers in mosques for calling Azans—If improper in a secular state.

The petitioners are muslims belonging to the congregation which habitually worships at the mosque commonly known as the Murgihata Mosque. The system of calling the Azan through an electrical loud-speaker five times a day was introduced into the mosque since May, 1953. The permission of the Commissioner of Police which it is necessary to obtain before operating a loud-speaker in a public place was not obtained before the practice of operating loud-speaker was introduced into the mosque. Several residents of the locality complained against the practice to the Commissioner of Police who countermanded the use of loud-speaker in the mosque. Application was thereafter made to the Commissioner on behalf of the worshippers at the mosque for permission to use a loud-speaker in the mosque in connection with the Azans. But the Commissioner refused to accord permission.—Being aggrieved by the Commissioner's refusal to accord permission, the petitioners approached the High Court under Article 226 of the Constitution of India and obtained a rule. But the High Court being of opinion that Commissioner has in no way exceeded his powers or used his discretion in excess of the exigencies of the situation, the rule was discharged.

It was argued on behalf of the petitioners that India is a Secular State and under Article 25 of the Constitution of India all persons are at liberty to freely practice their religion and that such liberty had been curtailed by the suppression of the use of loud-speakers to propagate the Azan. But there is a sharp distinction between religious faith and belief and religious practices. What the state protects is religious faith and belief. If religious practices run counter to public order, morality or health, the religious practices must give way before the good of the people of the state as a whole. *State of Bombay* v. *Narasu Appa Mali* (1), *Ratilal* v.

* Matter No. 146 of 1954, arising out of an application under Article 226 of the Constitution.

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State of Bombay (2), and *Reynolds* v. *United States* (3) referred to. It was next argued that there had been made a discrimination in this case because two adjoining mosques had been allowed to use loud speakers for propagating the Azans. But there is distinction between discrimination in law and Executive discrimination. In the present case there has not been exercise of executive discrimination of such description as calls for interference by Court.

Application under Article 226 of the Constitution of India.

The material facts will appear from the judgment.

Susil Chaudhury for the Petitioner.

A. K. Sen for the Respondent No. 1.

The judgment of the Court was as follows:—

January, 14.

D. N. Sinha, J.:—The petitioners are Muslims, who belong to the congregation, which habitually worships at the mosque situated at No. 38/A, Brabourne Road, in Calcutta, commonly known as the Murgihata Mosque.

It is alleged that since May, 1953, the system was introduced of calling the Azan (call for prayer) through an electrical loud-speaker five times a day. Before a loud speaker can be installed or operated in a public place, the previous permission of the Commissioner of Police has to be obtained. As this power is not disputed I need not dwell on the source or nature of it. It does not appear that any previous permission was obtained from the Commissioner for operating the loud-speaker. Several residents of the locality complained against the practice and the Commissioner through the local thana officers countermanded the use of it. Applications were thereafter made to the Commissioner by some of the residents through General Secretary of the West Bengal Pradesh Congress Committee and the Muta-

(1) [1952] A.I.R. Bom. 84.

(2) [1953] A.I.R. Bom. 183.

(3) (1879) 25 Law Ed. 244.

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walli of the Mirgihatta Mosque for permission to use a loud speaker in connection with the Azans. By his letter dated the 12th November, 1953, the Commissioner has refused to accord permission.

This rule was issued by Bachawat, J., on the 2nd day of November, 1954, upon the respondents to show cause why an appropriate writ should not be issued calling upon the respondents not to give effect to the order of respondent No. 1, countermanding the use of the loud speakers. The Mutawalli respondent is supporting the petitioner.

Before I proceed further, I have a few words to say about the use of loud speakers in connection with religious houses or festivals. The discovery of the means to magnify sound has indeed been a major scientific discovery of the age and is utilised in many useful ways e.g., the telephone, radio etc. But like every modern discovery in science, it has helped to create not merely a heaven but also a hell. The indiscriminate use of the electric loud speaker in connection with religious festivals in the city is a standing grievance of every peace loving citizen. The most offending instances are the uses to which it is put in connection with Hindu festivals, when the city is racked with the raucous cancophony of a thousand loudspeakers, doling out cheap jazz or cinema music, which is not only singularly inappropriate to such occasions, but to my mind, destructive of public health and morals. I might go so far as to say that in no other civilized country would this kind of thing be tolerated. I am now surprised to hear that the canker has now spread into the precincts of Muslim religious institutions. It may be that what is sought to be propagated in this instance is not profane music but a call to the faithful for offering daily prayers, but the objection remains. What is distasteful and abhorrent in the house of man is singularly inappropriate and even irreverent when used in the House of God. Prayer is intended to be a silent communion with the creator. It does not call for a tumultuous prelude or a noisy accompaniment.

It is said that the Muslim religion requires that prayer should be offered in congregational manner in a mosque five times a day and that each time, an *Azan* is to be called, inviting the

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faithful to prayer. This much is well known. I think these congregational prayers are a beautiful feature of the Muslim religion, and one remembers with pleasure the romantic sound of an early morning muezzin from the turrets of an up-country mosque on a misty morning. But to transform this into a noisy fanfare is neither artistic nor necessary. I find no where that the religion of the petitioners enjoins it.

In my opinion the Commissioner of Police has in no way exceeded his powers or used his discretion in excess of the exigencies of the situation. It is not that he has gone too far. The real grievance is that he has not gone far enough.

It is argued by Dr. Chaudhury that India is a secular state and under Article 25 of the Constitution, all persons are at liberty to freely practise their religion. He says that such liberty has been curtailed by the suppression of the use of loud speakers to propagate the *Azan* in a very crowded and noisy locality, where the Azan cannot be heard, unless magnified by some such device as a loud speaker.

This argument overlooks the essential features of Article 25 of the Constitution.

In *State of Bombay* v. *Narasu Appa Mali* (1), Chagla C.J. said as follows:

> "Now a sharp distinction must be drawn between religious faith and belief and religious practices. What the state protects is religious faith and belief. If religious practices run counter to public order, morality or health, then the religious practices must give way before the good of the people of the State as a whole."

In *Ratilal* v. *State of Bombay* (2), the Chief Justice of Bombay, said:

> "There are religions which bring under their own cloak every human activity . . . . . But it would

(1) [1952] A.I.R. Bom. 84.
(2) [1953] A.I.R. Bom. 183.

be absurd to suggest that a Constitution for a secular state ever intended that every human and mundane activity was to be protected under the guise of religion."

In *Reynolds* v. *United States* (1), Chief Justice Waite said:—

"Laws are made for the Government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the Civil Government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the Civil Government to prevent her carrying her belief into practice?"

The Commissioner points out in his affidavit that the continuous use of loud speakers would cause great annoyance to people residing in the locality, especially to invalids. He also points out that if this practice is taken up by the numerous mosques in the city it would cause great inconvenience and annoyance to citizens. I think these observations are perfectly justified.

It is next said that there has been a discrimination in this case because the two adjoining mosques, viz.. Nakhoda mosque and Colootola Mosque, have been allowed to use loud speakers for propagating the *Azăns*. So far as the law is concerned, I can find no discrimination in the law, but what is said that there has been an executive discrimination. It is well established that to prove executive discrimination it is necessary to prove that the discrimination is so widely practised and persistent as to give rise to an inference that the real intention of the legislature was to discriminate. No such inference can be made on the facts of this case. There is nothing to show that the circumstances prevailing in all the three mosques are the same. For instance, the Commissioner points out that the Murgihata mosque is situated in a less crowded locality than the other mosques and so far as the Nakhoda mosque is concerned there

(1) (1879) 25 Law Ed. 244.

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exists special reasons why a permission was accorded. Unfortunately, the special reasons have not been mentioned. However, it is evident from the affidavits that with regard to the other two mosques nobody has yet complained. It would be difficult to say that a thing was causing public annoyance if nobody is in fact annoyed. I hope, however that the practice where ever it is prevalent, should be put down, and the special reasons mentioned should be carefully looked into. On the facts before me, I cannot come to the conclusion that there has been any executive discrimination of a description which calls for inference by this Court. I must mention here that Mr. Sen appearing on behalf of the Commissioner has said that if any reasonable proposals are made, viz. that the loud speaker should only be used on special religious occasions, then the Commissioner would certainly be prepared to consider it on their merits and to find out whether there was any public objection to such a course. It has also been stated that there exists no intention whatsoever of singling out any particular community for discriminating treatment, particularly in religious matters. The application accordingly fails. The Rule must be discharged. I make no order as to costs. Any interim order that might have been made is vacated.

P.K.D.

Rule discharged.

APPELLATE CIVIL.

Before Mr. Justice P. N. Mookerjee and Mr. Justice S. K. Sen.

SITAL CHANDRA KOLEY & ORS.

v.

HEIRS OF MIHIRLAL KOLEY (DECEASED) & ORS.*

CIVIL.

1954.

June, 24.

Sale of undivided share of occupancy raiyati holding—Simultaneous agreement for re-conveyance validity of—The Registration Act, Sections 17 & 49—Indian Evidence Act, Sections 91 & 92—Effect of pre-emption under Section 26E of the Bengal Tenancy Act—Enforceability of agreement for re-conveyance against pre-empting co-sharers—Construction of Section 18(a) & 27(b) of Specific Relief Act—Transfer of Property Act, Section 40—Indian Trust Act, Section 91—Principles how far applicable—Bengal Tenancy Act, Section 26F (7), effect of—

Per P. N. Mookerjee, J.:—Law does not prevent parties from entering into simultaneous agreement for sale and re-sale or into one composite agreement for such purposes. The two may be inter-dependent in the sense that the "agreement upon one part of bargain may well have promoted agreement as to the rest" but so long as they are intended to be effected as separate and independent transactions, an outright sale to be followed by a re-conveyance, as opposed to a single transaction of the nature of mortgage or the like, are both legal and probable in law.

If the sale and re-sale can be separated and can be held to have been intended to be effected separately or as independent and separate transactions, there is no bar to the agreement for re-conveyance, whether oral or written or registered or unregistered, having full effect in law. Neither Sections 17 or 49 of the Indian Registration Act nor Sections 91 & 92 of the Indian Evidence Act will stand in the way.

An agreement for re-sale or re-conveyance like an agreement for sale, does not create any interest in or charge on, immoveable property or directly affect it. It merely creates the right to obtain a deed of re-conveyance and does not fall under Section 17(1) but under Section 17(2) of the Indian Registration Act and is not affected by Section 49 of that Act.

The stipulation for re-sale or re-conveyance is strictly collateral to the

* Appeal from Appellate Decree No. 246 of 1947 against the decree of Sri M. M. Bhattacharjee, Subordinate Judge, 1st Court of Zillah Howrah in Title Appeal No. 186 of 1946, dated 14th of September, 1946 reversing the decree of Janab J. Ahmed, Munsif, Amta, dated the 23rd of April, 1946.

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sale and may be proved under Sections 91 & 92 of the Indian Evidence Act.

A simultaneous agreement for re-sale may be enforced against a subsequent transferee of the property except *bona-fide* transferee for value without notice [Vide Sections 18(a) & 27(b) of the Specific Relief Act, the expression " imperfect title " occuring in the latter Section obviously including cases of no title too].

The obligation arising under such agreement is annexed to the ownership of the property as it is intended to be performed and can only be performed by a person who is the owner of the property and not otherwise or independently of such ownership. It is enforceable against all persons except a *bona-fide* transferee for consideration. (Vide Section 40 of the Transfer of Property Act). It is also an obligation in the nature of a Trust similarly enforceable under Section 81 of the Indian Trust Act. The principles of these Sections, if not the Sections themselves, consistent as they are with justice, equity and good conscience, would in the absence of provisions to the contrary, apply to all transfers, voluntary or involuntary and statutory or otherwise, and affect all transferees, unless they are *bona-fide* transferees for value with notice.

The transfer pre-empted or to be pre-empted under Section 26F of the Bengal Tenancy Act is the sale subject to the obligation arising from the agreement for re-sale. " The right title and interest accruing to the transferee (pre-emptee) from the transfer ", is the entire bundle of rights and obligations passing under the sale and the agreement for re-sale. The obligation under the agreement for re-sale is enforceable against all subsequent transferees—voluntary or involuntary, statutory or otherwise except *bona-fide* transferees for value without notice and is enforceable against a pre-emptor with notice of the agreement for re-sale.

Section 26F(7) of the Bengal Tenancy Act applies to incumbrances created after the sale. Though a simultaneous agreement for re-sale is an incumbrance within the meaning of the sub-section it is not one created after the sale as it arises simultaneously with the sale.

A pre-emptor under Section 26F of the Bengal Tenancy Act who takes a pre-emption order or institutes pre-emption proceedings with notice of an agreement for re-sale, prior to or contemporaneous with the sale, and otherwise valid and enforceable in law is bound by the same and cannot resist its enforcement by reason of Sub-section 7 of that Section.

Per S. K. Sen, J.:—Section 2(d) of the Transfer of Property Act excludes the application of Section 40 of that Act to transfers by operation of law. The principles underlying the provisions of the Act, though not directly applicable to transfers by operation of law, have been applied in many cases to such transfers. Though Section 40 of the Transfer of Property Act may not be directly applicable, it lays down an equitable principle which

is applicable to the case of transfers by operation of law, as in the present case, under Section 26F of the Bengal Tenancy Act. Section 91 of the Indian Trusts Act is also relevant in this connexion.

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Sital Chandra Koley v. Heirs of Mihirlal Koley (deceased)

Appeal by the Defendants.

Suit for specific performance of a Contract of reconveyance.

The material facts will appear from the judgment.

Charu Chandra Ganguli and *Narendra Nath Banerjee* for the Appellants.

Sarat Chandra Janah and *Arun Kumar Janah* for the Respondents.

C.A.V.

The judgments of the Court were as follows:—

June, 24.

P. N. Mookerjee, J.:—This appeal raises an interesting question.

On 4th July 1945 the Respondents Nos. 1-4 filed a suit against the appellants and one Mohanta Patra for specific performance of a contract of reconveyance. That suit was dismissed by the Trial Court but, on appeal, it was decreed by the learned Subordinate Judge, First Court, Howrah. From this Appellate decision the present second appeal has been preferred by defendants Nos. 2 and 3.

Briefly stated, the Plaintiffs-Respondents case was as follows:—

The disputed property which compromises an undivided share of an occupancy ravati holding originally belonged to them (Respondents Nos. 1-4). On 15-3-45 in presence of an arrangement between the parties for sale and resale, they (the plaintiffs) sold the suit property to Mohanta Patra (who was Defendant No. 1 in the trial Court) by the Kobala (Ex. 1) and simultaneously obtained from him the agreement for reconveyance Ex. 2 which is the foundation of the

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present suit. The Appellants before us (who are Defendants Nos. 2 and 3 in the trial court), alleging to be co-sharers of the disputed occupancy rayati holding, applied for pre-emption under Section 26F, of the Bengal Tenancy Act against the transferee Defendant No. 1 alone and succeeded in getting an order in their favour. The Respondents duly tendered to the Appellants the consideration, payable under the agreement for reconveyance Ex. 2, but the latter refused to accept the same and reconvey the suit property.

The Appellant's defence was that the alleged agreement for reconveyance Ex. 2 was not genuine and that, in any event, it was not enforceable against them and could not affect or prevail over their rights in respect of the disputed property. They claimed to have become absolutely entitled to the suit property as a result of the pre-emption proceedings and they also set up *inter alia* the defence of bonafide transferees for value without notice.

The learned Munsif came to the conclusion that the agreement Ex. 2 was not genuine and, in that view of the matter, he dismissed the Respondents' suit, consideration of all other questions being rendered unnecessary by reason of his above finding. On appeal, the learned Subordinate Judge reversed the learned Munsif's decision, holding *inter alia* that the agreement Ex 2 was genuine and that the Appellant's pre-emption must be subject to the said agreement. The learned Judge further held that the Appellants had actual, in any event, constructive-notice of the said agreement before the pre-emption proceedings and were thus not bonafide transferees without notice. The Respondents' suit was, accordingly, decreed by the Lower Appellate Court and the unsuccessful defendants Nos. 2 and 3 have now come up in Second Appeal to this Court.

Three questions were raised in support of this appeal. In the first place, the learned Subordinate Judge's finding that the agreement Ex. 2 was genuine was challenged. It was next contended that, even assuming that the said finding was correct, that agreement could not in law affect the Appellant's title to the property, obtained under the order of pre-emption, and the said title could not be held to be subject to the said agreement Ex. 2.

Thirdly, it was urged that, in any event, the Appellants were in the position of bonafide transferees for value without notice in relation to the disputed property, acquired by them in the pre-emption proceedings, and the learned Subordinate Judge's finding to the contrary was wrong. It was, accordingly, claimed that, on this ground at least the agreement Ex. 2 should be held not be binding or enforceable against them (the Appellants) and the plaintiffs suit should be dismissed.

Of the above three contentions the first and the third may be shortly disposed of.

The question whether the agreement Ex. 2 was genuine or not is a pure question of fact. True, the judgment of the learned Subordinate Judge is, on this point, a judgment of reversal. But he appears to have considered all the different aspects of the matter and all the relevant materials on record before affirming the genuineness of the agreement Ex. 2. In these circumstances, it is not open to us to interfere with his said finding in second appeal. That finding must, accordingly, stand.

On the third question too, the learned Subordinate Judge's finding in the plaintiffs favour cannot be disturbed. On a review of the evidence before him the learned Judges has held that the present Appellants had actual notice of the plaintiff's agreement Ex. 2. He has further held that, in any event, they must be held to have had constructive notice of the same from the plaintiffs undisturbed possession of the suit property after and inspite of the Kobala Ex. 1 as, even on the view of facts, most favourable to them, they must at least be deemed to have failed to make the necessary enquiries in the matter. Neither of these grounds is really open to challenge before us. The learned Judges has believed the evidence of the Plaintiffs witness, P.W. 2, that the present Appellants had actual knowledge of the plaintiffs agreement Ex. 2 even before they lodged their pre-emption application. Admittedly also, the plaintiffs remained in possession of the suit property inspite of the Kobala Ex. 1 and there is nothing to show that the contesting defendants who are the Appellants before us made the relevant enquiries in the matter. In this state of facts, it is hardly open to us to say

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in Second Appeal that the learned Subordinate Judge was not justified in holding that the contesting defendants had notice actual and or constructive of the plaintiffs agreement Ex. 2 sometime before the institution of their pre-emption proceedings and, accordingly, we affirm his said finding.

The Appellants first and third contentions thus failing, the position must be accepted that the disputed agreement for reconveyance Ex. 2 was genuine and, further, that it was simultaneous with the Kobala (Ex. 1) and made in pursuance of the arrangement for sale and resale, and that the Appellants had notice of the same before the relevant pre-emption proceedings and on that footing, the Appellant's second contention, namely, the question of the rights and obligations of the parties under the said agreement (Ex. 2) vis-a-vis the pre-emption proceedings will have to be determined. The question, thus arising, is a pure question of law, depending mainly upon the true construction of Section 26F more particularly Section 26F(7) of the Bengal Tenancy Act and also upon sections 18(a) and 27(b) of the Specific Relief Act, Sections 40 and 54 of Transfer of Property Act and Section 91 of the Indian Trusts Act.

Under Section 26F (7) of the Bengal Tenancy Act to quote only its relevant part—"the right title and interest accruing to the transferee (pre-emptee) from the transfer" vests in the successful pre-emptor "free from all incumbrances which have been created after the date of the transfer." The necessity of this latter provision arises because, under the statute, "the right title and interest," referred to in the earlier part of the extract, quoted above, vests in the pre-emptor only when the order of pre-emption is made. It appears further that the liability for rent for the intervening period remains with the transferee as, under clause (b) of the said sub-section 7, the transferee's liability on account of rent ceases from the date of the pre-emption order. Indeed, it seems to me that, broadly speaking, the statute seeks an equitable adjustment of the rights and liabilities of the parties with particular reference to the date of the transfer and places the pre-emptor substantially in the same position as the pre-emptee (transferee) was when he took the relevant transfer, forming the subject-matter of the pre-emption.

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On the wording of the section two questions demand consideration for our present purpose, namely:—

(i) What is "the right, title and interest accruing to the transferee from the transfer" when the relevant sale is accompanied by a simultaneous or contemporaneous agreement for re-sale or re-purchase?

and (ii) Whether the agreement for re-sale or re-purchase constitutes an 'incumbrance' and, if so, is it an incumbrance "created after the date of the transfer?"

Now, there is nothing in law to prevent parties from entering into simultaneous agreements for sale and re-sale or into one compact or composite agreement for such purposes. The two may be inter-dependent in the sense that the "agreement upon one part of the bargain may well have promoted agreement as to the rest" but, so long as they are intended to be effected as separate and independent transactions, an outright sale to be followed by a reconveyance, as opposed to a single transaction of the nature of mortgage or the like they are both legal and provable in law. "The determining factor lies in the ultimate shape of the agreement rather than in the process by which it is reached" and, although the agreement for sale and re-sale may have been entered into at one and the same time and being inter-dependent as stated above, may be broadly looked at as forming parts of the same transaction, if the sale and the re-sale can be separated and can be held to have been intended to be effected separately or as separate and independent transactions, namely, an outright sale to be followed by a reconveyance, there is no bar to the agreement for reconveyance, whether oral or written or registered or un-registered, having full effect in law. Neither the Indian Registration Act (Sections 17 and 49) nor the Indian Evidence Act (Sections 91 and 92) will stand in the way.

A pure agreement for re-sale or reconveyance which is by itself no more than a mere agreement for sale "does not, by itself, create any interest in or charge on"—nor does it, strictly speaking, directly affect,—immoveable property (Vide Section 54, of the Transfer of Property Act). So far as immoveable property

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is concerned, the writing (the deed of agreement for re-sale or repurchase) as such merely creates the right to obtain another document, namely, the deed of reconveyance. It will thus fall not under Section 17(1) but under Section 17(2) of the Indian Registration Act and will not be within the mischief of Section 49 of the said Act. Again, the stipulation for re-sale or reconveyance being strictly collateral to the sale which it has induced, though touching on a common subject-matter and being thus, broadly speaking, part of the same transaction, may well be proved under Sections 91 and 92 of Indian Evidence Act.

What I have stated above seems to be the true effect of the Privy Council decision *Sara Veeraswami* alias *Sara Veerraju* v. *Talluri Narayya* (deceased) *and others* (1), read in the light of the two English cases *Morgan* v. *Griffith* (2), and *Erskine* v. *Adeane* (3), and two decisions of this country *Harkisandas Bhagawandas* v. *Bai Dhanu* (4), and *Ma Nan Shein* v. *Yaing* (5), which were particularly referred to by their Lordships and the principles whereof were evidently approved by them. The terms of the sale are not affected by the agreement for re-sale or re-purchase. The outright sale stands but, side by side, stands also the simultaneous agreement for re-sale and both are valid and provable in law.

The simultaneous agreement for re-sale no matter that, strictly speaking, it is prior to the actual sale may well be enforced against a subsequent transferee of the property except a bonafide transferee for value without notice [Vide Sections 18(a) and 27(b) of the Specific Relief Act, the expression "imperfect title" occuring in the earlier of these two sections obviously including cases of no title too]. Clearly also, the obligation under the said agreement is one annexed to the ownership of the property as it is intended to be performed and can be performed only by a person who is the owner of the property and not otherwise or independently of such ownership. It is thus enforceable against

(1) [1949] A.I.R. P.C. 32; L.R 75 I.A. 252.
(2) (1871) 6 Ex. 71.
(3) (1873) 8 Ch. App. 756.
(4) [1926] A.I.R. Bom. 497, (F.B.); I.L.R 50 Bom. 566.
(5) [1927] A.I.R. Rang. 314.

all persons except a (bonafide) transferee for consideration (value) without notice (Vide Section 40 of the Transfer of Property Act). It is also an obligation in the nature of a trust, similarly enforceable under Section 91 of the Indian Trusts Act. I am further of the opinion that the principles of these sections, if not the sections themselves—consistent as they are with "justice equity and good conscience"—would, in the absence of provisions to the contrary, apply to all transfers, voluntary or involuntary and statutory or otherwise, and affect all transferees, unless they are bonafide transferees for value without notice, and the obligation, referred to above, will have to be viewed accordingly. Clearly also, this obligation under the agreement for re-sale arises and or becomes annexed to the ownership of the property simultaneously with the transfer under the original sale and "the right, title and interest accruing to the transferee (vendee) from the transfer (sale)" cannot be considered apart from that obligation and, in effect, therefore, it is subject to that obligation which, however, is not enforceable against a subsequent transferee for value without notice.

Viewed in the above context, the transfer pre-empted or to be pre-empted under Section 26F of the Bengal Tenancy Act is the sale subject to the obligation, arising from or by reason of the agreement for re-sale or re-purchase. "The right, title and interest accruing to the transferee (pre-emptee) from the transfer" is, therefore, the entire bundle of rights and obligations, passing under the sale and the agreement for resale. The obligation under the agreement for re-sale is, as I have shown above, enforceable against all subsequent transferees—voluntary or involuntary, statutory or otherwise—except (bonafide) transferees for value without notice. It is thus enforceable against a pre-emptor with notice of the agreement for re-sale and the pre-emptor's rights under Section 26F of the Bengal Tenancy Act will be subject to the obligation under the said agreement and must be viewed in that light.

Even assuming that the words "that right title and interest accruing to the transferee (pre-emptee) from the transfer" in Section 26(F) (7) of the Bengal Tenancy Act means only the right, title and interest, passing under the relevant sale and not the sale, read with the agreement for re-sale or re-purchase, or

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in other words, that the transfer, contemplated by or in the section, does not include the collateral agreement for re-sale as well, the position does not materially change. The agreement for re-sale undoubtedly gives rise to an obligation, annexed to the ownership, which, whether as such obligation or otherwise, is enforceable against all subsequent transferees with notice. This obligation which effectively springs into existence simultaneously with the sale in question is, having regard to its very nature and legal incidents, plainly, in my view, an incumbrance" within the meaning of the said Section 26(F) (7) of the Bengal Tenancy Act. At any rate, it is hardly inappropriate to call it an "incumbrance" within the meaning of that section. It is not, however, an incumbrance "created after the date of the transfer"—which obviously means subsequent to the transfer, though not necessarily on a different or subsequent date—as it arises simultaneously with the sale and not subsequent thereto. The obligation, therefore, arising from the simultaneous agreement for re-sale or purchase, is not affected by Section 26F (7) which, in its material part, as already quoted, refers only to incumbrances . . . . . created after the date of the transfer."

The substance of the matter may now be conveniently set forth as follows:—

> . An agreement for re-sale may well stand side by side with a sale and or an agreement for sale. They do not necessarily involve any incongruity or illegality. The fact that the sale and the resale are to be effected as separate and independent transactions does not prevent the obligation under the agreement for re-sale from becoming annexed to the ownership (which posses by the sale) simultaneously with the transfer so as to remain unaffected by sub-section 7 of Section 26F of the Bengal Tenancy Act. The obligation under the agreement for re-sale becomes annexed to the ownership by reason of the principle, underlying Section 40 of the Transfer of Property Act. That section, it is true, applies generally speaking, only to voluntary transfers [Vide Section 2(d) of the Act] but the principle, underlying it, does, in my view, apply to involuntary transfers as well including statutory transfers unless excluded either expressly or by necessary implication.

The same result also follows from a consideration of Section 91 of the Indian Trusts Act. The agreement for re-sale creates some sort of a fiduciary relationship between the parties, to the benefit of which the original transferor will be entitled, so long as the agreement remains enforceable in law, and this fiduciary relationship or the benefit thereof which arises simultaneously with the agreement for re-sale and, therefore, simultaneously with the transfer too, and is available against a transferee with notice, is not affected by Section 28F (7) of the Bengal Tenancy Act.

Applying the above principles to the facts of the instant case before us, the nett position is that, in spite of the pre-emption, the agreement for resale (Ex. 2) remained enforceable—and it has been validly enforced by the learned Subordinate judge against the present appellants who though they are in a sense statutory transferees, are transferees with notice of the same.

I would, therefore, affirm the decision of the learned subordinate judge, decreeing the respondents' suit for specific performance of the agreement for resale Ex 2.

On behalf of the Appellants, strong reliance was placed on the decision of this Court, reported in *Tarapada Karati* v. *Sudhamoy Dolui* (1), and we were pressed to hold that agreement for reconveyance Ex. 2 was not enforceable against the Appellants. We have carefully examined the decision cited but we do not think that it really affects the question, now before us.

The same remarks apply to the later decision of this Court, reported in *Nishi Kanta Das* v. *Jnanendra Nath Mondal* (2), where the learned Chief Justice sitting with Sinha, J. re-affirmed his earlier view *Tarapada Karati's Case* (1), that for purposes of section 26F of the Bengal Tenancy Act, the existence of a contemporaneous agreement for resale,—or even of a reconveyance in pursuance of such agreement [Vide *Nishi Kanta Das's Case* (2)], would not be relevant.

(1) (1948) 53 C.W.N. 678.
(2) (1952) 57 C.W.N. 253.

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The question whether such an agreement was legally enforceable against the pre-emptor if he had notice of the same prior to the pre-emption order or the pre-emption proceedings did not—and, indeed, it could not—strictly arise in any of the two cases, cited above. Such a question or a question of title between the pre-emptor and the claimant under the agreement or the reconveyance would indeed be wholly outside the scope of pre-emption proceedings, out of which, admittedly, the two cases cited arose. Any observations on either of the said two questions in the judgments of the learned Chief Justice would thus be more or less in the nature of *obiter dicta* and, although deserving the highest respect and the utmost consideration, they would not be binding on this Court, unless found sound on principle. To the extent, therefore, that those observations conflict with the views, expressed in this judgment, I would respectfully put them aside as, in my opinion, they do not appear to have taken note of the reasons which have prompted me to reject the Appellants contention and which I have sufficiently set out above.

As to the merits of the actual decisions in the said two cases cited *Nishi Kanta Das's Case* (1), and *Tarapada Karati's Case* (2), it is quite unnecessary to express any opinion on the present occasion. The actual decisions were possibly right. At least, they seem to be so *prima facie*, and further consideration may well be observed for appropriate future occasions. Strictly speaking, all that was actually decided in those two cases was merely this, "that the existence of a contemporaneous agreement for resale or repurchase does not necessarily preclude the application of Section 26F of the Bengal Tenancy Act." The position may be conceded and may, even, be accepted, but it does not, from such concession or acceptance, necessarily follow that the pre-emption order nullifies the agreement or that it (the agreement) cannot be enforced against the pre-emptor, even if he had notice of the same prior to the said order or even before the pre-emption proceedings.

I would, therefore, hold that the pre-emptor under Section 26F of the Bengal Tenancy Act who takes a pre-emption order

(1) (1952) 57 C.W.N. 253.
(2) (1948) 53 C.W.N. 678.

or, at any rate, institutes his pre-emption proceedings with notice of an agreement for resale, prior to or contemporaneous with the sale in question and otherwise valid and enforceable in law, is bound by the same and cannot resist its enforcement by reason merely of sub-section 7 of that section.

It has been argued before us that the adoption of this view may involve hardship and injustice and may encourage attempts to evade the statute but I am not impressed. Specific performance is in the discretion of the Court and it has ample power to refuse it to prevent hardship or injustice or evasion of statute. In the facts of this case we feel amply satisfied that the plaintiffs cannot be denied relief on any of the above grounds. Rather, ends of justice require that the agreement (Ex. 2) should be specifically enforced against the Appellants (who applied for pre-emption with full knowledge and or notice of the same) when the records contain sufficient materials to justify the finding of the learned Subordinate Judge that, by the Kobala (Ex. 1), the suit property, was sold at about one-fourth of its real value. Refusal of specific performance would mean that the Appellants would get the suit land at a nominal value and the plaintiffs respondents would lose their valuable property for a paltry sum for no fault of theirs. We do not also find any attempt on the plaintiffs' part to evade the statute, as, on the findings of the final Court of fact, the agreement for resale (Ex. 2) must be held to be genuine and *bonafide*. No question of hardship to the Appellants also arises in the circumstances of the present case.

In the above view of the matter, I would dismiss the present appeal and uphold the decision of the learned Subordinate Judge decreeing the plaintiffs' suit for specific performance. Having regard, however, to the circumstances of this case, I would direct the parties to bear their own costs in this Court.

S. K. Sen, J.:—This second appeal arises from a suit for the specifi performance of a contract for reconveyance of 1.165 acres of homestead and danga or high land in Mouza Kumaria. The land in question was sold on 15-3-43 by the plaintiff-respondents Mihilal Koley and others to one Mohanta Patra for

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the consideration of Rs. 150/-. The appellants Sital Chandra Koley and another applied under Section 26F of the Bengal Tenancy Act for pre-emption of the land and they succeeded in their application though the application was opposed by Mohanta Patra. The plaintiffs instituted Title Suit No. 338 of 1945 in the court of the Munsif, Amta, for reconveyance of the land to them, alleging that there was a simultaneous agreement for reconveyance of the land to them by the purchaser Mohanta Patra provided they could repay the amount of the consideration within the period of five years, and they alleged that the pre-emptors Sital Chandra and another had notice of such agreement and were bound by the same. In the suit, Mohanta Patra was impleaded as Defendant No. 1, while Sital Chandra Koley and another were Defendants 2 and 3. Defendants 2 and 3 contested the suit; while defendant No. 1 appeared at a somewhat late stage and supported the plaintiff. The learned Munsif dismissed the suit, holding that there was no simultaneous agreement for reconveyance and that the unregistered deed of agreement had been created for the purpose of the suit by collusion between the plaintiffs and defendant No. 1. In appeal, the learned Subordinate Judge, Howrah, held that the deed of agreement was a genuine document and that there was a simultaneous agreement for reconveyance. He also held that defendants had notice of the agreement and must be held to be bound by the same. Accordingly he allowed the plaintiffs' appeal. Defendants 2 and 3 have preferred this second appeal. The points urged in this appeal are that the learned Subordinate Judge was wrong in holding that the defendants 2 and 3 had notice of the agreement, and that in any case as the defendants 2 and 3, appellants, did not derive their title from the original transferee, Mohanta Patra, but from an order of the court giving effect to their statutory right of pre-emption, the agreement for re-conveyance could not be enforced against them.

As regards the first point, it is urged that as the agreement for reconveyance is not registered, it cannot be said that the appellants had knowledge of the same. This point was not however overlooked by the learned Subordinate Judge. The learned Subordinate Judge referred to the evidence of the scribe Rajani Kanta Sil (P.W. 2) that prior to the pre-emption case defendant No. 3 had asked for copies of the deed of sale to Mohanta Patra

and the deed of agreement from him. The learned Subordinate Judge considered P.W. 2 a reliable witness. Further, the learned Subordinate Judge found that the plaintiffs continued to be in possession in spite of the sale of Mohanta Patra, and that the appellants had obtained possession from the plaintiffs after their success in the pre-emption case, and that such possession must have put the appellants on their inquiry even if they had not known of the agreement before, and that in the circumstances it must be held that the appellants had notice of the agreement. The inference drawn by the learned Subordinate Judge from the facts found by him is a legal inference, and there is no reason to consider it a wrong finding.

On the question of the existence of a simultaneous agreement for reconveyance, the finding of the learned Subordinate Judge, being a finding of fact based on evidence, is binding on us. The question now arises whether the agreement is enforceable against the appellants who derived their title by pre-emption. The right and title obtained by pre-emption under section 26F of the Bengal Tenancy Act is set out in sub-section (7) clause (a), as follows:—

> "From the date of the making of the order under sub-section (5) the right, title and interest in the portion or share of the holding accruing to the transferee from the transfer shall, subject to the provisions of section 22 and to any orders passed under sub-section (6), be deemed to have vested, jointly and free from all incumbrances which have been annulled or created after the date of the transfer, in the co-sharer tenants whose applications to purchase have been allowed under this section."

A contract for sale (including reconveyance) of immoveable property does not by itself create any interest in or charge on such property (section 54 of Transfer of Property Act); but it creates an obligation annexed to the ownership of immoveable property, and may be enforced against a transferee with notice thereto). Such obligation annexed to the ownership of immoveable property must be regarded as an encumbrance within the meaning of section 26F (7) of the Bengal Tenancy Act. In view of the terms of sub-section (7) of section 26F quoted above,

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the pre-emptor gets the right, title and interest of the transferee free from all encumbrances created after the date of transfer; hence if the transferee were to make an agreement for reconveyance after the date of the transfer to him, such agreement would not bind the pre-emptor. But where there is a simultaneous agreement for reconveyance made on the same date as the date of transfer, the pre-emptor cannot get the right, title and interest of the transferee free from the burden of such agreement; the principle of section 40 of the Transfer of Property Act would apply in such a case; the pre-emptor if he had notice of the agreement before he obtained the order of pre-emption would be bound by the agreement. It has been urged on behalf of the appellants that a pre-emptor who obtains a transfer to himself by operation of law is not a transferee within the meaning of section 40 of the Transfer of Property Act. No doubt section 2(d) of the Transfer of Property Act provides that nothing contained in the Transfer of Property Act other than section 57 and Chapter IV (sections 58 to 104) will be deemed to affect any transfer by operation of law and therefore section 40 of the Act is not directly applicable to transfer by operation of law, like transfer under section 26F of the Bengal Tenancy Act. But the principles underlying the provisions of the Act not directly applicable to transfer by operation of law have in many cases been applied to such transfer. Reference may be made to *Shivaprasad* v. *Prayagkumari* (1), where the principles of section 36 were applied; *Ramanathan* v. *Unnamalai* (2), where the principle of section 53 was applied, and other cases. In *Nur Mahomed* v. *Dinshaw* (3), their Lordships of the Privy Council did not expressly hold that section 40 of the Transfer of Property Act would apply to execution sales, but did not rule out its application. They observed, "Assuming that . . . . . section 40 of the Transfer of Property Act has full scope, it is only if the purchaser at a judicial sale bought with notice of the contract that it could be enforced against him."

A Co-sharer tenant may, like any other person, sell his share of a tenancy to obtain funds to tide over a crisis, expecting to

(1) (1933) I.L.R. 61 Calc. 711.
(2) [1943] I.L.R. Mad. 47.
(3) [1922] A.I.R. P.C. 398.

be able to buy back his share when the crisis is over and conditions are easier for him; in such a case, he might make an agreement for repurchase within a stipulated time, rather than a mortgage by conditional sale which is unacceptable to many parties because of the provisions of the Bengal Money Lenders Act, 1940; such an agreement for repurchase would generally reduce the price he could get for his share; in the present case, the learned Subordinate Judge has found that the price obtained by the plaintiff respondents was much lower than the actual value of the property sold. In such a case, it is clearly inequitable that another co-sharer, who is able to step into the shoes of the buyer, in view of the provisions of section 26F of the Bengal Tenancy Act, should have a better title than that of the buyer, in not being subject to the agreement of repurchase, and should thus be able to obtain the share of the tenancy at an unduly low price and to bar the original vendor's right to repurchase for ever. It would clearly be equitable to hold that the co-sharer who steps into the shoes of the buyer should be bound, by the buyer's agreement to reconvey, provided that he had notice of such agreement. Though section 40 of the Transfer of Property Act may not directly apply, it lays down an equitable principle which is applicable to the case of transfer by operation of law, e.g. under the provisions of section 26F of the Bengal Tenancy Act, and this principle should in our opinion be applied in this case. Section 91 of the Trusts Act is relevant in this connection, viz. "when a person acquires property with notice that another person has entered into an existing contract affecting the property of which specific performance could be enforced the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract." In view of the principle laid down in section 40 of the Transfer of Property Act, and the provisions of section 91 of the Trusts Act, it must be held that the plaintiffs may obtain specific performance of their agreement of repurchase against the pre-emptors.

The learned Advocate for the appellants has also relied on the reasoning in the case *Tarapada Karati* v. *Sudhamoy Dolui* (1), in support of his contention that an agreement for recon-

(1) (1948) 53 C.W.N. 678.

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veyance does not avail against claim for pre-emption. It is quite right that an agreement for reconveyance does not bar an application for pre-emption under section 26F; it was held in the above case that a sale with a simultaneous oral agreement for reconveyance was still an absolute sale and the agreement could not exclude the operation of section 26F; of the Bengal Tenancy Act. In a later case *Nishi Kanta Das* v. *Jnanendra Nath Mandal* (1), the earlier decision was re-affirmed and it was held that all subsequent transfers by the transferee were subject to the right of the pre-emption under section 26F of the Bengal Tenancy Act. But the question now before us is whether the obligation arising from an agreement for reconveyance, if simultaneous with the transfer, can be enforced against the pre-emptor; this question did not arise for consideration in either of the above cases; these cases do not help to decide the question now before us, and the question must be answered independently. As pointed out earlier, though a transfer by operation of law is not a transfer within the meaning of section 40 of the Transfer of Property Act, the principle laid down therein may be applied to such a transfer, and that being so, it follows that an agreement for reconveyance simultaneous with the transfer sought to be pre-empted may be enforced against the pre-emptor where the pre-emptor had notice of such agreement.

Accordingly this appeal must fail and I agree with the order passed by my learned brother.

P.K.R. *Appeal dismissed.*

(1) (1952) 57 C.W.N. 253.

APPELLATE CIVIL.

Before Mr. Justice R. P. Mookerjee
and Mr. Justice Renupada Mukherjee.

PURNA CHANDRA CHANDRA

v.

SK. FAKIR MOHAMMAD.*

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August, 13

Compulsory acquisition—Compensation money—Agreement that the entire compensation money to be awarded in case of compulsory acquisition will go to the lessor—Effect of.

The appellant was the owner and the respondent was the lessee under the appellant in respect of certain premises acquired by the Calcutta Improvement Trust. The lease in favour of the respondent was granted by the appellant before the acquisition. In accordance with a condition in the lease the respondent repaired the building at a cost of four thousand rupees before the acquisition. It was stipulated in the lease that, if during the continuance of the lease the demised premises or any substantial part there of be auquired under the provisions of the Land Acquisition Act, 1894, or any other Act in force for acquisition of land, the lease will terminate on the publication of the declaration in respect of such acquisition and the lessee will not be entitled to any compensation whatsoever either from the lessor or from the acquiring body. After the acquisition was made, the appellant claimed the entire compensation fixed by the Land Acquisition Collector as due to him alone. The respondent, on the other hand, claimed that as lessee he was entitled to a portion of the compensation. Thereupon a joint award was made and a reference was made to the President, C I. Tribunal. The Tribunal awarded Rs. 4000/- out of the compensation money to the respondent together with the statutory allowance of fifteen per cent and the balance of the compensation money to the appellant together with the statutory allowance. Being aggrieved by the decision of the Tribunal, the owner preferred appeal to the High Court. The only question in issue in the appeal was whether the lessee was, in view of the stipulation in the lease, entitled to any portion of the compensation awarded for the land.

Held—It is the market value of a property which is to be awarded as compensation in case it is compulsorily acquired. There is clear

*Appeal from Original Decree No. 11 of 1954 against the decree of Sri P. K. Sarkar, President of the C. I. Tribunal in L. A. Case No. 14 of 1953 (Apptt.) 5th. Oct. 1953.

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stipulation in the lease in the present case that if there be compulsory acquisition the lessee would not be entitled to any portion of the compensation awarded for such acquisition. The compensation awarded for compulsory acquisition is under the law to the apportioned amongst the different claimants. If the lessee gives up his right to the compensation awarded by the Collector, he cannot afterwards be heard to say that he has share in the compensation money.

Held further—The lessee being bound under the terms of the lease to repair the building at a cost of four thousand rupees, the decision of the President of C. I. Tribunal awarding Rs. 4000/- out of the compensation money to the lessee is incorrect. The parties having with their eyes open entered into the contract and having at the same time agreed that the entire compensation money in case of compulsory acquisition would go to one of the parties only, the court has no option in the matter.

Gadadhar Dass v. *Dhunput Sing* (1), *Gadadhar Bhatta* v. *Lalit K. Chatterjee* (2), In re Arbitration between *Morgan and London & North Western Rly. Co.* (3), *Ashutosh Chandra Mitra* v. *Haripada Ganguli* (4) and *Rai Harendra Lal Roy Bahadur Estate Ltd.* v. *Hem Chandra Naskar* (5)—*referred to*—

Radhanath Maity v. *Krishna Chandra Mukherji* (6)—distinguished.

Appeal by the Lessor.

Reference to the President, C. I. Tribunal, for apportionment of compensation awarded for compulsory acquisition.

The material facts will appear from the judgment.

A. C. *Sarkar*, R. *Goho* and *Biswanath Dhur* for the appellant.

Sudhansu Kumar Sen and *Sovendra Madhab Basu* for the respondent.

The Judgment of the Court was as follows :—

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R. P. Mookerjee, J.—Pr. Nos. 86, 87, 87/1 and 87/2, Phears Lane, Calcutta, were acquired in connection with C. I. Trust scheme No. LVII. The notification was issued in Aug. 1948, and the declaration was published on the 4th Aug. 1949.

(1) (1881) I. L. R. 7 Calcutta 585.
(2) (1909) 10 C. L. J. 476.
(3) (1896) 2 Q. B. 469.
(4) (1921) 35 C. L. J. 133.
(5) (1949) 53 C. W. N. 803 (P. C.)
(6) (1936) 40 C. W. N. 722.

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The subject matter of the appeal before us is limited to the question of apportionment so far as pr. No 86 Phears Lane is concerned. On the 18th Sep. 1947, a lease of the premises was granted by the landlord, the appellant before us, to the tenant respondent. As stated already, the notification under section 4 was issued within a year of the lease. One of the conditions on which the lease was granted was that the tenant agreed to repair the building at a cost of four thousand Rupees, such repairs to be completed within 6 months of the execution or the commencement of the lease. It was further agreed between the parties that—

> "If at any time during the said term the demised premises or any material or substantial parts there of be acquired under the Provisions of the L. A. Act, 1894, or any other Act for the time being in force for the acquisition of land for public purposes the term hereby granted shall be deemed to terminate and cancelled on the authentic publication of the declaration in respect of such acquisition and *the* lease shall not be entitled to any conpensation whatsoever from the Lessor or from the acquiring body on behalf of the Lessor but without prejudice to claim of the Lessee for compensation as against the Govt. or any local authority."

On behalf of the owner the entire compensation fixed by the L. A. Collector was claimed as due to him alone. The lessee, Fakir Mohammad, claimed that as the lessee he was entitled to a portion of the said compensation. Accordingly, a joint award was made and a Reference was made to the President, C. I. Tribunal. The Tribunal has, on hearing the parties, allowed Rs. 4000/- out of the compensation money to the lessee together with the statutory allowance of fifteen percent. The balance of Rs. 11145/- with statutory allowance has been awarded in favour of the owner. The present appeal has been preferred on behalf of the owner.

The only question in issue is whether the lessee can in view of the agreement between the lessor and the lessee,

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dt. the 8th Sep. 1947, be entitled to any portion of the compensation awarded for the land.

In *Gadadhar Das* v. *Dhanpat Singh* (1) effect was given to a clause in a durputni deed whereby the durputnidar agreed to be content only with an abatement from the rent which paid to the putnidar relinquishing his claim to any share of the compensation money In *Gadadhar Bhatta* v. *Lalit K. Chatterjee* (2), a convent in lease that upon acquisition of the premises under the L. A. Act, the whole of the compensation for the land should belong to the landlord alone was held to be valid in law and enforceable such a convent was not illegal or contrary to public policy even if the leasehold interest was tranasferable and the rent was fixed in perpetuity. Reliance was placed on *In Re Arbitration between Morgan and London and Northwestern Rly co.* (3), where a similar convenant was held to be valid and enforceable. Similar view was expressed in *Ashutosh Chandra Mitra* v. *Haripada Ganguli* (4). The Judicial Committee in *Rai Harendro Lal Roy Bahadur Estate Ltd,* v. *Hem Chandra Naskar* (5), affirmed the principle enunciated in the earlier cases, and the proprietors alone were held to be entitled to the compensation money in question.

This principle was not seriously contested before us, but a claim was made on behalf of the lessee that the amount spent by him for repairs and structural alterations had rightly been decreed in favour of the lessee. In support of such a claim, reliance was placed on a Bench decision of this Court in *Radhanath Maity* v. *Krishna Chandra Mukherjee* (6), Although reference was made in course of argument before that Bench to *Ashutosh Mitra* v. *Hari Pada Ganguli* (4), towards the concluding portion of the judgment the lessee was allowed a certain share of the compensation money for reason with due respect to the learned Judges, which are not clear.

(1) (1881) I. L. R. 7 Calcutta 585.
(2) (1909) 10 C. L. J. 476.
(3) (1896) 2 Q. B. 469.
(4) (1921) 35 C. L. J. 133.
(5) (1949) 53 C. W. N 803.
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We have before us the registered Kabuliayat which was the subject matter of consideration in *Radanath Maity's case* (1) and we shall quote from the same the relevant extract. The Kabuliayat was executed by Radhanath Maity in favour of Benoy Kumar Mukherjee on the 30th June 1914. It was a Kabuliyat for term of five years and it was the common case of the parties that the tenant had after the expiry of the lease been holding over on the same terms and conditions. The relevant portion of that kabuliyat was in the following terms :—

"After the expiry of the term, I shall remove the aolat (trees) or houses etc. grown or erected by me at my own cost and put you in Khas possession of the said land. Further be it mentioned that if the Municipality or the Government acquires the said land at any time for any purpose then you shall get the compensation awarded therefor. I shall not have any concern therewith and if some portion of the said land be acquired then I shall not get abatement of rent therefor. After the expiry of the term, I shall give up (the said land) without any notice and without any objection. No sort of right will accrue to me in the said land either at present or in future according to law".

Inspite of such a clear provision in the kabuliayat, this Court proceeded to consider what steps had been taken by the lessee to raise the level of the land and the amount spent therefor and observed :.

"The clause that the tenant is not to receive any compensation in case the acquisition is made by Govrenment or Municipality is not inconsistent with the nature of tenancy, namely the tenancy being one from month to month. The clause regarding the nontaking of compensation cannot be said to be a clause which is collateral to the ordinary incidents of the holding. The real test is as to whether this is a clause which has really the effect of affecting the tenancy so long as it exists. We do not see anything inconsistent in this clause with the precarious nature of the tenancy".

(1) (1936) 40 C. W. N. 722

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Even after giving expression to this opinion, the learned Judges proceeded to consider the effect of holding over, and on the authority of certain English decisions concluded that the clause regarding the abandonment of compensation money was not in any way inconsistent with the condition under which the tenancy was held under the previous kabuliayat of 1906. It was then held that the clause, however, did not disentitle a tenant to claim any compensation which might be given on the acquisition of the land subject to this that the clause did not preclude the tenant from claiming such part of the compensation as had been the result of improvements on the land made by the tenant.

The decision above referred to rested, for reasons referred to above, upon the fact of holding over and the conditions appearing in an earlier kabuliayat being different from those in a later one. In the present case before us, there is no such question, and there is a clear provision under which the lessee is directed not to claim any portion of the compensation which may be awarded if the property in question be compulsorily acquired. It is the market value of the property which is the compensation allowed. The compensation so allowed is to be approtioned amongst the different claimants. If, therefore, the lessee gives up his right to any portion of the compensation which is fixed by the Collector, he cannot be heard to say that he has any share in that compensation money.

In the present case, there is another important factor which militates against the claim of the lessee. Under the agreement, the lessee was bound to undertake repairs to the structures to the extent of at least Rs. 4000/- and that within a limited period. The learned President came to the conclusion that Rs. 4000/- had been spent by the lessee as stipulated If the parties with their eyes open entered into a contract of that description and at the same time agreed that the entire compensation money, in case of compulsory acquisition, would go to one of the parties only, the Court has no option in the matter. The entire compensation money must go to the lessor who is the owner.

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The decision of the learned President, C. I. Trust Tribunal, awarding Rs. 4000/- out of the compensation money in favour of the lessee must accordingly be set aside and the Reference made by the lessee rejected. This appeal is accordingly allowed and the decree of the Court below in so far as it awarded Rs. 4000/- out of the compensation money to the lessee be set aside and we direct that the entire compensation money together with the statutory allowance be paid to the lessor appellant

The appellant will be entitled to the costs of the hearing of the appeal in this Court. The hearing fee is assessed at five gold mohurs. There will be no order as to costs so far as the hearing before the Tribunal is concerned.

Renupada Mukherjee J. :—I agree.

Appeal allowed.

P.K.D.

LEAVE TO APPEAL TO THE SUPREME COURT.

Before Mr. P. B. Chakravartti, Chief Justice, and Mr. Justice S. R. Das Gupta.

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1953

December, 7

UNION OF INDIA

v.

NALINI RANJAN GUHA*

Indian Arbitration Act, Section 39—Constitution of India, Articles 132, 133, 134 and 135—Application for leave to appeal to Supreme Court from order passed by a Judge of High Court, sitting singly, referring dispute to arbitration, if competent.

A Judge of the High Court, sitting singly, having by an order directed matters in difference between the petitioner and the respondent to be referred to arbitration, the petitioner has applied for a certificate from the High Court to prefer an appeal to the Supreme Court from the said Order. Reliance was placed in argument on behalf of the petitioner on Sub-Section 2 of Section 39 of the Indian Arbitration Act. Section 39 of the Arbitration Act, however, has not conferred any Jurisdiction on the Supreme Court which that Court does not possess under the Constitution of India itself. The Section mentions "His Majesty in Council" and it has now been adapted so as to substitute a reference to the Supreme Court. The Section has only been "adapted", which means that it has been brought into conformity with the Constitution. The Indian Parliament has not yet legislated and conferred further jurisdiction on the Supreme Court. The present application, if it is under the provisions of the Arbitration Act, is misconceived.

Sub-clause (3) of Article 133 of the Constitution states in the clearest possible terms that no appeal shall lie to the Supreme Court from the judgment, decree or final order of one Judge of a High Court unless Parliament, by law, otherwise provides. The Parliament not having provided otherwise, no certificate was possible under Article 133 in view of the clear bar contained in Sub-clause (3) of that Article.

Even Article 135 is of no avail to the Petitioner. In order to make out a right of appeal under Article 135 it must in the first place be established

*Application for Leave to Appeal to the Supreme Court in the matter of Award No. 86 of 1952 under the Indian Arbitration Act.

that an appeal from an order of the present kind passed by a Judge of the High Court, sitting singly, lay to the Federal Court immediately before the commencement of the Constitution. It cannot, however, be contended that an appeal from such an order lay to the Federal Court immediately before the commencement of the Constitution. In the Second place, Article 135 does not contemplate any certificate from High Court. The provisions for certificate are incorporated only in Article 132, 133 and 134. Article 135 merely provides that the Supreme Court shall also have some further jurisdiction with respect to matters not covered by Articles 133 and 134. Nothing is said in the Article regarding certificate from High Court.

Moreover, the arbitrator to whom the dispute was directed to be referred had died long before this application for certificate was drafted and made.

Lastly, the order complained of is obviously not a final order and as such does not belong to the category of orders appealable under Article 133.

The application was an application for a certificate from the High Court to prefer an appeal to the Supreme Court.

The material facts will appear from the Judgment.

G. P. Kar for the Petitioner Union of India.

R. Chowdhury for the Respondent.

The judgment of the Court was as follows :—

December, 7

P. B. Chakravartti, C. J. This is an application for leave to appeal to the Supreme Court from an order passed by Mr. Justice Bachawat on May 5, 1953, sitting singly. By that order he directed that all matters in difference between the petitioner, the Union of India, and the respondent be referred to the arbitration of Mr. K. K. Basu, Barrister-at-law. The petitioner asks for a certificate from this Court to prefer an appeal from that order.

In view of the several patent objections to the petition, it is surprising that such a petition should have been filed at all. The petition purports to ask for leave to appeal to the Supreme Court and it must be presumed that the said prayer was intended to be made under the Constitution of India. But the Constitution is not even named in the petition. The petitioner refers only to the Indian Arbitration

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Act and seems to have been advised that even under that Act, this Court could be asked to grant a certificate for the purposes of leave to the Supreme Court. Mr. Kar, representing the petitioner, drew our attention to sub-section (2) of section 39 of the Indian Arbitration Act where it is provided that nothing in section 39 would affect or take away any right to appeal to the Supreme Court. He seems to have thought that a right of appeal to thet Supreme Court was implied in sub-section (2) of section 39 of the Arbitration Act and if such a right existed, his client could properly ask this court for a certificate. The impression upon which the petitioner acted was obviously erroneous. Section 39 of the Arbitration Act cannot possibly confer any jurisdiction on the Supreme Court which that Court does not possess under the Constitution itself. The section mentions His Majesty-in-council and probably it has now been adapted so as to substitute a reference to the Supreme Court, although the adaptation was not shown to us. But in any event, the section has only been "adapted", which means it has been brought into conformity with the Constitution. The Indian Parliament has not yet legislated and conferred some further jurisdiction on the Supreme Court. In so far as the present petition purports to proceed under the provisions of the Arbitration Act, it is clearly misconceived.

Turning now to the Constitution, sub-clause (3) of Article 133 states in the clearest possible terms that no appeal shall lie to the Supreme Court from the judgment, decree or final order of one judge of a High Court unless Parliament, by law, otherwise provides. It is not contended that the Parliament has yet provided otherwise. That being so, so far as Article 133 is concerned, there could not possibly be a certificate under that Article in view of the clear bar contained in sub-clause (3).

Mr. Kar submitted that he would rely on Article 135, but even that Article could not avail him in the least. In the first place, in order to make out a right of appeal under that Article he had to establish that such an appeal lay to

the Federal Court immediately before the commencement of the Constitution. Mr. Kar was unable to contend that immediately before the commencement of the Constitution, an appeal would lie to the Federal Court from an order of the present kind passed by a Judge of the High Court, sitting singly. In the second place, Article 135 does not seem to contemplate any certificate to be granted by the High Court at all. The provisions for certificate are incorporated only in Articles 132, 133 and 134. Article 135 is expressed in general terms and merely provides that the Supreme Court shall also have some further jurisdiction with respect to matters to which provisions of Article 133 or Article 134 do not apply, provided an appeal lay in such matters to the Federal Court immediately before the commencement of the Constitition Nothing is said in the Article as regards a certificate to be granted by the High Court.

For the reasons given above, it appears to me that the application is, on the face of it, unmaintainable. There is also a further ground which appears from the merits of the order sought to be appealed from. By that order Mr. Justice Bachawat referred the dispute to the arbitration of Mr. K. K. Basu. Unfortunately Mr. K. K. Basu is dead and he had died some considerable time before the present application was drafted and made. In those circumstances, why the petitioner should have felt it necessarty to present the present petition at all is, by no means clear.

Lastly, the order sought to be appealed from is obviously not a final order. It decided no question or right, merely made an appointment of an arbitrator and left the arbitration to be held and completed. That benig so, it does not, on the face of it, belong to the category of orders, appealable under Article 133.

For the several reasons given above, this application must fail and it is dismissed with costs,

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S. R, Das Gupta, J. I want to add a few words to what my Lord the Chief Justice has said.

In my opinion, the application is not only misconceived, but displays complete muddle headedness on the part of those who might have advised the Government to make the present application. Mr. Kalyan Basu died, as my Lord the Chief Justice has pointed out, long before the application was made. As a result of the death of Mr. Basu the parties are relegated back again to the same position in which the application under section 8 of the Indian Arbitration Act was made and the order complained of has now become infructuous. As a result of Mr. Basu's death there is now no arbitrator and the party interested should have made an application again under section 8 of the Indian Arbitration Act. In any event, as pointed out by my Lord the Chief Justice, the application is misconceived from all points of view. It cannot be an application under Article 133, nor can it be an application under Article 134 of the constitution. If it is an application under Article 135, there is no question of obtaining leave or certificate from this Court. I am surprised that such a frivolous application is made on behalf of the Union of India.

For the reasons mentioned above, I agree with my Lord the Chief Justice that application should be dismissed with costs.

P K. D. *Application rejected*

S K. Mondal : Solicitor for the Petitioner

M. K. Roy *Choudhury & Co.* : Solicitors for the Respondent.

APPELLATE CIVIL.

LETTERS PATENT APPEAL.

Before Mr. Justice K. C. Das Gupta and Mr. Justice B. K. Guha.

SURJA KUMAR MANJHI & ORS.

v.

TRILOCHAN NATH & ORS.*

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1955

January, 11.

Landlord's Suit for ejectment of tenant—Validity and sufficiency of notice to quit—Onus on landlord to show date of commencement of tenancy—Yearly rent reserved but no registered lease—Effect thereof in view of Sections 107 and 106 of Transfer of Property Act.

In a suit by landlord for ejectment of tenant one of the defences was that the notice to quit that was served on the tenant was not valid or sufficient in law. The Trial Court and the Lower Appellate Court, both, held that the plaintiffs had failed to prove sufficiency of notice as they had not proved by evidence the date of commencement of the lease. The plaintiffs appealed to the High Court and the case came up in second appeal before a single Judge. The single Judge, relying on two facts, allowed the appeal and held that the notice to quit was sufficient. One of the two facts relied on was that that the notice served was appended to the plaint and thus there was, by implication, a statement by the plaintiffs that the tenancy was one from month to month according to Bengali Calendar. The other fact relied on was that, the tenant not having, in his written statement, traversed the right of the plaintiffs to determine the tenancy with effect from the last day of the Bengali month, there was presumption that the tenancy ran from the first day to the last day of the Bengali month—[Vide *Trilochan Nath & ors.* v. *Kalipada Mallik & ors.* (1)—*Report's note*].

Held—that the fact of the defendant not having denied in the written statement the right of the plaintiffs to determine the tenancy with effect from the last day of a Bengali month could not justify a conclusion that the tenancy ran from the first day to the last day of a Bengali month. If the case that the tenancy ran from the first day to the last day of a Bengali month had been made in the plaint, the omission of the defendant to traverse the same in the written statement would have justified a con-

* Latters Patent Appeal No. 1 of 1954 against the judgment of the Hon'ble Mr. Justice, Renupada Mookerjee, one of the Judges of this Court, 24th of June, 1953 in Appeal from Appellate Decree No. 159 of 1953.

(1) (1953) 92 C.L.J. 127.

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clusion that he had admitted that fact. The plaint in this case, however, did not make any statement regarding the commencement or termination of the month of the tenancy. The fact, that the notice to quit served was appended to the plaint did not amount to a statement in the plaint that the tenancy was from the first day to the last day of a Bengali month. The defendant having challanged the validity and sufficiency of the notice, the onus lay heavily on the plaintiffs to show the date of the commencement of the tenancy. This onus could have been discharged by the plaintiffs by adducing evidence regarding the date on which the tenancy commenced.

Held further—that, though a yearly rent was reserved, yet, as there was no registered document, as required by Section 107 of the Transfer of Property Act, the Courts must proceed on the basis that there was no valid agreement between the parties and consequently the rights of parties will be regulated by law as provided in Section 106 of the Transfer of Property Act as if no agreement existed at all.

Ram Kumar Das's Case (1) referred to.

Letters Patent Appeal by the Tenant Department.

Suit for ejectment.

The material facts will appear from the judgment.

Rishindra Nath Sarkar and Satya Charan Pain for the Appellants.

Apurbadhan Mukherjee, Chandra N. Laik and Dwijendra Nath Das for the Respondents.

The judgment of the Court was as follows:—

January, 11. **K. C. Das Gupta, J.:**—This appeal is against the decision of our learned brother Renupada Mookerjee, J, allowing an appeal directed against an appellate decree. The respondents before us brought a suit for ejectment of the present appellants on the allegation that the defendant Kalipada Mullick was a tenant of a tank described in the schedule, his right being "thika nonpermanent" and the tenancy being for rearing and catching fishes. It was averred that the tenancy was terminated by a proper notice to quit, but the appellants had not given up

(1) [1953] S.C.A 79.

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possession. There were several defences raised, but the only defence with which we are at present concerned is that the notice served was not valid or sufficient in law. The trial court held that the tenancy was one from year to year and could be terminated by six months' notice and so the notice was insufficient. It held, in the alternative, that even if the tenancy was regarded to be a monthly tenancy requiring fifteen day's notice, there was no valid notice as the plaintiffs have failed to show on what date the tenancy started. In appeal the learned Subordinate Judge held that the tenancy was from month to month and that fifteen days' notice would be sufficient but he also agreed with the trial court that the plaintiffs had failed to prove sufficiency of notice as they have not proved by evidence the date of the commencement of the lease.

Renupada Mookerjee, J, has agreed with the trial court that the tenancy was one from month to month and fifteen days' notice would be sufficient. He has, however, relied on two facts for a conclusion that the notice was sufficient. The first is that the notice that was served was appended to the plaint and thus there was, by implication, a statement by the plaintiffs that the tenancy was from month to month according to Bengali calendar month. The other fact on which Mookerjee, J, has relied is that "the tenant did not traverse in his Written Statement the right of the plaintiffs to determine the tenancy with effect from the last day of the Bengali month". On these facts he has held that "it can be safely presumed that the tenancy which has been found to be a monthly tenancy by the lower appellate court runs from the first day to the last day of the Bengali month and there is absolutely no material to show that the month of the tenancy should be calculated in a different manner". Before us Mr. Sarkar made an attempt to show that the trial court was right in its view that the tenancy was a yearly tenancy so that six months' notice will be required to determine it. We are, however, of opinion, on the authority of he decision of the Supreme Court in *Ram Kumar Das's case* (1), that as though a yearly rent is said to have been reserved, there was no registered document as is required in such a case under sec. 107 of the Transfer of Property Act, it must be held that, though the

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intention may have been to create a lease from year to year, that intention "was not expressed in proper legal form" and so it cannot be given effect to and that the courts must proceed on the basis that there was no valid agreement between the parties and consequently the rights of parties will be regulated by the law is provided in sec. 106 of the Transfer of Property Act as if no agreement existed at all. We, therefore, agree with Mookerjee, J, that the tenancy in this case clearly not being for agricultural or manufacturing purposes, must be held to be one from month to month and terminable by a fifteen days' notice expiring with the end of the month of the tenancy. With great respect to Mookerjee, J, however, we are unable to agree that the fact of the defendant not denying in the written statement the right of the plaintiffs to determine the tenancy with effect from he last day of a Bengali month can justify a conclusion that the tenancy runs from the first day to the last day of a Bengali month. It has to be noiced that in the plaint itself no case was made that the tenancy runs from the first day to the last day of a Bengali month. If that case had been made in the plaint, the omission of the defendant to traverse the same would have justified a conclusion that he admitted that fact. The plaint in this case, however, did not make any statement as regards the comencement or the termination of the month of the tenancy. Even if the notice that had been served which was later marked as Ex. 1 was appended to the plaint, a fact which is disputed it will not be reasonable to hold that that amounted to a statement in the plaint that the tenancy was from the first day to the last day of a Bengali month. When, in these circumstances, the defendant challenged the validity and the sufficiency of the notice, the onus lay heavily on the plaintiffs to show that the notice was valid and sufficient and for that purpose to show the date of he commencment of the tenancy.

This onus could have been discharged by the Plaintiffs by adducing evidence as regards the date on which the tenancy commenced. No such evidence was given, the only statement which can be considered in some way connected with the case being, as has been rightly pointed out by the learned Subordinate Judge, the statement of one plaintiff that he gave set-

element in Baisakh. But Baisakh may be the first day of Baisakh or the last day of Baisakh, or any other day in the month. If the case was that the tenancy commenced on the last of Baisakh, there should have been evidence to show that the tenancy did commence from the last of Baisakh. It is not permissible for the court to fill up the lacuna of evidence in a matter of this nature by surmising that when the plaintiff in his evidence stated "Baisakh" he meant the 1st. of Baisakh.

We have, therefore, come to the conclusion that the decision of Mookerjee, J, that there was a valid and sufficient notice determining the tenancy is erroneous, based on a misconception of the presumption to be drawn from the omission of the defendant to traverse in his Written Statement a story, - not made in the plaint, that the tenancy was from the first day of the month to the last day of a Bengali Month.

I would, therefore, allow the appeal, set aside the judgment and decree passed by this Court in S.A. 159 of 1948 and restore the judgment and the decree passed by the learned Subordinate Judge. The appellants before us will get their costs of the Letters Patent Appeal and of the Second Appeal.

B. K. Guha, J. I agree.

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P. K. D.

Appeal allowed.

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Before Mr. Justice K. C. Das Gupta and Mr. Justice B. K. Guha

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February, 24.

UNION OF INDIA

v.

JANAB MUKHTER AHMED & ORS.*

Income Tax Investigation Commission—Functions of the Commission—Section 3 of the Taxation on Income (Investigation Commission) Act—Nature of case or points referred to the Commission—Findings of the Commission—Section 8 (4) of the Taxation on Income (Investigation Commission) Act—Such findings whether final only regarding factum and quantum of evasion for purposes of assessment and re-assessment—Findings of the Commission on ownership of property how far binding.

Proceedings before Collector—If proceedings in assessment or re-assessment—Finality of findings contemplated by Section 8(4) if can be extended to proceedings other than for assessment and re-assessment.

The duties of the Commission as set out in Section 3 of the Taxation on Income (Investigation Commission) Act, apart from investigating and reporting to the Central Government on all matters relating to taxation on income with particular reference to the extent to which the present law is adequate to prevent the evasion thereof, is to investigate any case or points in a case referred to it by the Central Government under Section 5 of the Act. The case or points in a case that the Central Government may refer to the Commission are only on the question of fact or quantum of evasion. Findings of the Commission on the case or points in a case referred to it are therefore necessarily findings as regard the factum and quantum of evasion for the purposes of assessment or re-assessment. In arriving at such finding the Commission has to record findings on other facts. These findings on other facts will not come within the description of the words, "findings recorded by the Commission on the case or on the points referred to it" appearing in Section 8 (4) of the Act. The findings of the Commission regarding the ownership of property are not findings within the meaning of Section 8 (4) to which finality is given and the Collector was not bound to accept such finding as correct.

In dealing with the application for the appointment of a Receiver the Collector was doing nothing in "assessment or re-assessment" proceedings which had concluded long ago. Whatever finality might attach

* Civil Rule No. 3908 of 1953 against an Order of the Collector of 24-Pargans passed in R. M. Case No. 680 of 1952-53 dated 8-7-1953.

to the findings of the Commission in the assessment and re-assessment proceedings that finality cannot be extended to the proceedings before the Collector. It would have been outrageous if the findings that are recorded by the Commission as steps towards their final findings as regards the factum or extent of evasion would also be made final in any other proceedings other than the assessment or re-assessment proceedings with a view to which the investigation is made.

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Union of India v. Janab Mukhter Ahmed.

K. C. Das Gupta, J.

Application under Art 227 of the Constitution of India for appointment of a Receiver.

The material facts will appear for the judgment.

Sankar Banerjee and Balai Lal Pal for the Petitioner.

Atul Chandra Gupta, A. K. Sen and Pritish Chandra Roy for the Opposite Party.

The judgment of the Court was as follows—

February, 24.

K. C. Das Gupta, J. :—In this application the Union of India seeks this Court's intervention, in exercise of its powers of superintendence under Article 227 of the Constitution of India, with an order passed by the Collector, 24-Parganas refusing the prayer of this applicant for appointment of a Receiver of the two properties premises No. 48, Metcalfe Street, Calcutta and a house known as Alexandra Court bearing premises No. 60/1, Chowringhee Road, Calcutta. It was stated in the application for appointment of a Receiver that Hafiz Shamshed Ahmed was liable for an amout of Rs. 11,83,629—3—0 on account of assessment of income tax made under the Indian Income Tax Act and penalties imposed on him, that though a number of certificate cases had been started against him for recovery of this amount no recovery had been made, that if the properties were sold in certificate proceedings they were not likely to fetch adequate prices and that in these circumstances it was just and convenient that a Receiver should be appointed in execution for the purposes of recovery of these arears. At the date of the application Hafiz Shamshed Ahmed was already dead. His son Mukhtar Ahmed who was impleaded in the application as opposite party no. 2 appeared in Court and filed a petition of objection in which

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he contended that these properties had belonged to him even during the life time of his father and were not liable for the arears.

The Collector took notice of the fact that long before the death of Hafiz Shamshed Ahmed, Mukhtar Ahmed had been treated by the Income Tax Department as the owner of the properties in question and was assessed for the income tax arising out of the said premises for some years and he considered the application of the Income Tax Department to be "most illogical". Finally he observed that the Income Tax Department "cannot therefore say that the premises mentioned by them are clearly in seisin of this Court in respect of the preceedings against the father Shri Hafiz Samshed Ahmed" and rejected the application.

The sole ground that has been stated to induce the Court to interfere with the order passed by the Collector under Article 227 of the Constitution is that the Collector was bound to accept as correct the conclusion recorded by the Income Tax investigation commission in its report submitted to the Central Government that during the years in respect of which the arrears have arisen Hafiz Shamshed Ahmed was the owner of these properties and that Mukhtar Ahmed was the owner of these properties and that Mukhtar Ahmed was not. It is worth mentioning that two cases the case of Hafiz Shamshed Ahmed as well as the case of Mukhtar Ahmed was referred to the Investigation Commission by the Central Government under Section 5 and one joint report was sent by the Investigation Commission to the Central Government Paragraph 23 of the report reads thus :

"In the result, we report as follows :—

(a) As to R.C. No. 312

(*i*) The amount of income from business, earned between 1.4.1939 and 31.3.1947, in respect of which Shamshed Ahmed evaded taxation is Rs. 10,59,900/-.

(*ii*) The said income is to be distributed as follows and the amounts concerned added to the Assessed business in-

come of the assessee for the corresponding periods for the purposes of re-assessment :—

Accounting year	Assessment year	Amount which escaped taxation.
1939—40	1940—41	Rs. 25,000
1940—41	1941—42	Rs. 25,000
1941—42	1942—43	Rs. 50,000
1942—43	1943—44	Rs. 2,00,000
1943—44	1944 45	Rs. 3,00,000
1944—45	1945—46	Rs. 3,00,000
1945—46	1946—47	Rs. 1,00,000
1946—47	1947—48	Rs. 59,900
		Rs. 10,59,900

(b) As to R.C. No. 342.

In the case of Mukhtar Ahmed, no income of his own has been found to have escaped taxation and accordingly there is no evasion to be reported".

In the earlier portions of the report the commission had dealt with the question whether for the years in question the properties in 48, Metcalfe Street and the Alexander Court were the properties of Hafiz Shamshed Ahmed or, as contended by both Shamshed Ahmed and Mukhtar Ahmed, the properties of the latter and it recorded its conclusion in no uncertain terms that the case that Mukhtar Ahmed was the owner of the properties was false and that the properties did belong in those years to Shamshed Ahmed and he was liable for income tax in respect of the income accruing from those properties in the years in question. If this conclusion be binding on the Collector in deciding the application for appointment of a Receiver, there would be scope for an argument that the Collector was in error in refusing the application of appointment of a Receiver.

The question is whether the conclusion as recorded in the earlier part of the report as regards the ownership of the properties during the years in question as giving rise to the liability for income tax is a conclusion which the Collector was bound to accept as correct. I am unable to find any

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basis in law for a view that such conclusion was binding, on the Collector. Reliance is placed on behalf of the petitioner on the provision of Sub-section (4) of section 8 of the Investigation Commission Act which is in these words :

"In all assessment or re-assessment proceedings taken in pursuance of a direction under sub-section (2), the findings recorded by the Commission on the case or on the points referred to it shall, subject to the provisions of sub-sections (5) and (6) be final".

It is contended that the Commission has recorded its finding not only on the fact of evasion and on the quantum of evasion but also for the purpose of arriving at these findings has recorded a finding as to the ownership of the properties and that this finding falls within the words "the findings recorded by the Commission on the case or on the points referred to it". The provision under which the reference to the Commission is made appears in the first sub-section of section 5 of the Act and is in these words:

"The Central Government may at any time before the 1st day of September, 1948, refer to the Commission for investigation and report any case or points in a case which the Central Government has *prima facie* reasons for believing that a person has to a substantial extent evaded payment of taxation on income, together with such material as may be available in support of such belief ....."

The letter or the resolution by which the Central Government referred the cases of Mukhtar Ahmed or Shamshad Ahmed to the Investigation Commission has not been produced. It is curious also that the report on which so much emphasis is put by the Union of India does not appear on the record of the proceedings before the Collector. We do not know whether the report was made available to the Collector. The report sent by the Commission has however been made available to us. It is apparent on a reading of the report that the Central Government stated that they had reason to believe that both Mukhtar Ahmed and Hafiz Shamshed Ahmed had evaded payment of taxation to a sub-

stantial extent and referred to the commission for report on these cases of evasion. The duties of the Commission are set out in section 3 of the Act. It is stated there that the duties of the Commission would be, apart from investigating and reporting to the Central Government on all matters relating to taxation on income with particular reference to the extent to which the present law is adequate to prevent the evasion thereof, to investigate any case or points in a case referred to it under section 5 and make a report thereon to the Central Government. It seems reasonable to think the case or the points in a case that the Central Government may refer are only on the question of fact or quantum of evasion. Necessarily therefore the findings on the case or on the points referred to the Commission appearing in sub-section (4) of section 8 are findings as regards the factum and quantum of evasion. It must necessarily happen that for arriving at such findings as regards quantum and factum of evasion the commission has to record findings on other facts. In my judgment these findings on other facts will not come within the description of the words "the findings recorded by the Commission on the case or on the points referred to it". In *Suraj Mall Mohta and Co. v. A. V. Visvanatha Sastri* (1), the Supreme Court in dealing with differences between the procedure of the Investigation Commission and the ordinary procedure of assessment under the Income Tax Act observed: "Under the provisions of Section 8 of the impugned Act, the findings of fact given by the Commission as to factum and extent of the evasion are final and conclusive". "While it is true that the exact cannotation of the Words" the findings recorded by the Commission on the case or on the point referred to it "was not being considered by the Supreme Court in that case this observation of the Court cannot but be held to be a great importance and assistance to us in the present case. My conclusion is that the Commission's findings as regards the ownership, of the property are not findings within the meaning of S. 8 (4) of the Act. This alone is in my judgment sufficient for holding that the Collector was not bound to accept as correct the conclusion recorded by the Investigation Commission as regards the ownership of the properties.

(1) [1954] 17 S.C.J. 611.

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There is however another reason for the same conclusion. Under the terms of sub-section (4) of section 8, the findings recorded by the Commission shall be final only "in all assessment of re-assessment proceedings taken in pursuance of a direction under sub-section (2)". In dealing with the application for appointment of a Receiver the Collector was doing nothing in "assessment or re-assessment proceedings". Those proceedings had already concluded and it was on the result thereof that the liabilities were calculated. The stage at which the application for appointment of a Receiver was made and had necessarily to be long after the conclusion of the re-assessment proceedings. Whatever finality might attach to the findings recorded by theCommission in the assessment or re-assessment proceedings, the finality can by no means be extended to the proceedings before the Collector for appointment of a Receiver.

It is easy to see why the legislature thought fit to make the findings recorded by the Commission final in the assessment or re-assessment proceedings. Unless that was done practically the whole purpose of investigation by the Commission will be frustrated. It is equally easy to see why the legislature limited the finality only to assessment or re-assessment proceedings. As has been observed by the Supreme Court in the case above referred to this is a very drastic measure and the proceedings before the Investigation Commission have not to be conducted like ordinary judicial proceedings. It would have been outrageous if the findings that are recorded by the Commission as steps towards their final finding as regards the factum or extent of evasion would also be made final in any proceedings other than the assessment or re-assessment proceedings with a view to which the investigation is made.

I have, therefore, come to the conclusion that the contention that the Collector was bound to accept the conclusion regarding the ownership of the properties as recorded by the Commission as final must fail. In my view the Collector very rightly refused the prayer for appointment of a Receiver. There is nothing that would justify us in interfering with the Collector's order under Article 227 of the Constitution.

I would therefore discharge the rule with costs.

B. K. Guha, J. I agree.

P. K. R. *Rule discharged*

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Before Mr. Justice S. K. Sen.

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1954.

May, 14

M. GOVINDAN

v.

MESSRS. GULABCHAND RAWATMULL*

Indian Contract Act—Proposal—Conditional acceptance of proposal—Section 7 of the Indian Contract Act.

Proposal—Effect of making counter-proposal—Section 5 of the Indian Contract—Revocation of counter proposal before either its acceptance or rejection—Original proposal in such case if can be availed of.

Presidency Small Causes Court Act—Powers of Full Bench, Court of Small Causes,—Order of Full Bench sending the case back to Trial Court to assess damage only—Legality—Section 38 of the Act.

Conditional acceptance of a proposal is not recognised by law. Section 7 of the Indian Contract Act provides that in order to convert a proposal into a promise the acceptance must be absolute and unqualified.

Section 5 of the Indian Contract Act provides that a proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer but not afterwards. In a case where a proposal is made but is followed by a counter-proposal, if the counter-proposal is accepted by the party making the original proposal, the original proposal is necessarily superseded by the counter proposal. If the counter-proposal is rejected by the party making the original proposal then also the original proposal cannot be deemed to be automatically revived. If however, the counter proposal is withdrawn before it is either accepted or rejected, it must be held that the original proposal stands unrejected, and its acceptance within a reasonable time from the date of its communication will be good.

By Section 38 of the Presidency Small Causes Court Act, the Full Bench may not only order a new trial it may also alter, set aside or revise the decree or order upon such terms as it thinks reasonable. If the decree may be altered, it is clear that finding on one issue may be revised, and where the remaining issues have not been decided, the case may be transmitted to the orginal Court for decision thereon.

* Civil Revision Case No. 1095 of 1953 against an Order dated 28-1-1953 passed by the Judges, Full Bench Court of Small Causes Calcutta on an application arising out of Suit No. 6986 of 1950 of the Court of Small Causes, Calcutta dated 24-11-1951.

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1954.

M. Govindan v. Messrs. Gulab Chand Rawatmull.

May, 14.

Application under Section 115 of the Code of Civil Procedure.

The material facts will appear from the judgment :—

Arun Kishore Das Gupta for the Petitioner.

Apurba Charan Mukherjee and Anil Kumar Sett for the Opposite party.

The judgment of the Court was as follows :—

S. K. Sen, J. :—This revisional application under section 115 of the Code of Civil Procedure is directed against an order of the Full Bench, Calcutta Small Causes Court, sending back the suit for assessment of damages to the court of Fifth Bench, Calcutta Small Causes Court.

The Plaintiff opposite parties M/S. Gulabchand Rawatmull instituted the suit for recovery of Rs. 1600/- as damages for breach of contract on the following allegations. They stated that the defendant company M/S. Haridas Weaving Establishment in Madras agreed to sell 18 bales of shirtings consisting of 400 pieces of 24 yards per piece at the rate of Rs. 32/- per piece; that the agreement was confirmed by a sale note despatched by the defendant company which reached the plaintiff company on the 14th of August, 1950 and that the plaintiffs accepted the sale note by sending a telegram on the 16th August, 1950; but on account of rise in prices the defendant company repudiated the contract by telegram and letter despatched on the 19th of August, 1950 and that the plaintiff company has, therefore, suffered loss to the extent of Rs. 4/- per piece because at the time when the supply was due to be made the price of shirting had gone up by Rs. 4/- per piece; so the plaintiff company claimed Rs. 1600/- as damages for breach of contract.

The defendant company contested the suit contending that there had not been a completed contract for sale and the sale note was only an offer which the plaintiff company did not accept but sent a counter offer by letter dated the

14th of August, 1950 which amounted to revocation of the proposal. The defendant company, therefore, contended that they were not liable for damages.

The trial court, namely the learned Judge, Fifth Bench, held that the letter of the 14th August, 1950, sent by the Plaintiff company was a counter offer by the plaintiffs and implied revocation of the defendant's original offer or proposal as contained in the sale note dated the 11th of August, 1950, which reached the plaintiff company on the 14th of August, 1950. The learned Judge also held that the sale note dated the 11th of August, 1950, accompanied by the letter Ext. 1(a) amounted to an offer and was not a complete contract as alleged by the plaintiff company. The learned Judge also found that the letter containing the counter offer which amounted to revocation of the original offer had reached the defendant company before the telegram of acceptance dated the 16th of August, 1950 and that, therefore, there had been no completed contract and the plaintiff was not entitled to damages.

There was an application before the Full Bench under section 38 of the Calcutta Small Causes Court Act and the Full Bench of the Calcutta Small Causes Court held that the letter of the 14th August, 1950 was a conditional acceptance and not a counter proposal and that as it was followed by unreserved acceptance contained in the telegram dated the 16th August, 1950 there was a completed contract, and that the defendant company had no legal power to repudiate the contract on the 19th of August, 1950 by letter and telegram, and that the defendant company was therefore liable for damages for breach of contract. The Full Bench sent back the case to trial Bench for assessment of measure of the damages.

The defendant company through M. Govindan has filed this revisional application under section 115 of the Code of Civil Procedure. Mr. Das Gupta, appearing for the defendant company, has urged that the Full Bench took an altogether wrong view of the letter of the 14th August, 1950 be-

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cause a conditional acceptance was not known to law and that therefore the order of the Full Bench could not be upheld. Mr. Das Gupta has also raised the point that the Full Bench had no jurisdiction to send back the case to the trial Bench for assessment of damages only but that the Full Bench had jurisdiction only to order an altogether new trial.

As regards the first point I must agree with Mr. Das Gupta that conditional acceptance is not recognised by law. Sec. 7 of the Iudian Contract Act provides that in order to convert a proposal into a promise the acceptance must be absolute and unqualified. The letter of the 14th August, 1950, written by the plaintiff company shows that the plaintiff company did not accept the offer of purchase of 400 pieces of Shirting at the rate of Rs. 32/- per piece but proposed that the same quantity should be supplied at the rate of Rs. 31/8/- per piece. No doubt the plaintiff company stated also in the letter that they were always willing to do business with the defendant company as they had been doing before and they also expressed the hope that the defendant company would accept the proposal and supply the shirting, but this did not show that the letter amounted to a conditional acceptance. As already stated, an acceptance must be full and unqualified and the proposal of the new rate which was a vital matter in the contract for sale clearly indicated that there was no agreement but there was a fresh proposal which was a counter offer.

Mr. Mukherjee, appearing for the plaintiff respondents, has urged that in any case the contract was completed because within three days of their getting the sale note Ext. 1, the plaintiff company by telegram accepted the offer contained in the sale note, and that in view of the terms under which the parties were doing business by correspondance by letter and occasionally by telegram, three days must be considered as reasonable time for the acceptance. Mr. Mukherjee has referred to sec. 6 of the Indian Contract Act which indicates the manner in which a proposal may be revoked. Under sec. 6a proposal is revoked—

(1) by the communication of notice of revocation by the proposer to the other party;

(2) by the lapse of the time prescribed in such proposal for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance;

(3) by the failure of the acceptor to fulfil a condition precedent to acceptance; or

(4) by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

It has, therefore, been urged that by merely making a counter-offer the original proposal contained in the sale note of 11th August, 1950, cannot be deemed to have been revoked and that offer must be deemed to have been subsisting. Mr. Das Gupta, on the other hand, has pointed out that sec. 6 deals with the question of revocation by the party which made the proposal and not with the question of refusal of an offer and rejection of a proposal, and has relied upon the authority of an English case, *Hyde-v-Wrench* (1). In that case the defendant offered to sell a house after some negotiation for £1000. The plaintiff offered £950 and after consideration for a few days the defendant rejected the proposal for selling the house for £.950. The plaintiff's agent thereafter on the same day as the rejection of the defendant reached him offered to buy house at the price of £.1000 at which the defendant previously offered to sell; but the defendant refused to sell at that stage. The question was whether there was a contract binding the defendant. It was held that there was no valid contract binding the defendant. It was observed in the judgment as follows: "The denfendant offered to sell it for £.1000, and if that had been at once unconditionally accepted, there would undoubtedly have been a perfectly binding contract; instead of that the plaintiff made an offer of his own, to purchase the property for £.950, and he thereby rejected the offer previously made by the defendant. I think that it was not afterwards competent for him to revive the proposal of the defendant, by tendering an acceptance of it; and that, therefore, there exists no obligation of any sort between the parties". This was a case of 1840 and the question naturally arises whether

(1) (1840) 49 E.R. 132; 3 Beav. 334.

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the law of contract in India which is governed by Indian Contract Act is the same as the law laid down in England in 1840 in the case of *Hyde*-v-*Wrench* (1). Mr. Das Gupta has pointed out that the case *Hyde*-v-*Wrench* (1). has been followed in India and in this connection he was referred to a decision of the Lahore High Court in the case of *Nihal Chand* -v- *Amar Nath* (2). In that case the head note is as follows: "A offered by a letter to sell only at Re. 0—14—0 in a rupee his claims against a certain Bank in liquidation to B. B offered Re. 0—13—9 a rupee which A did not accept. Then B accepted by telegram A's offer at Re. 0—14—0 a rupee. A did not assent to this, but he had not expressly withdrawn his original offer of Re. 0—14—0 a rupee. B sued A for damages for breach of contract.

Held—that B by his counter offer at Re 0-13-9 impliedly rejected A's original offer at Re. 0-14-0 and there was no contract". In that case it was argued before their Lordships of the Lahore High Court that sec. 6 of the Contract Act laid down the relative law in India and the priciple laid down in *Hyde* -v- *Wrench* (1) would not be applicable in India. Their Lordships rejected the contention in the following words: "The appellant has contended that sec. 6 of the Contract Act does not include revocation by means of a counter proposal, and that, as a Code is exhaustive on matters with which it deals, therefore the law in India is different on this pont from the law in England.....We are clearly of opinion that this argument is wholly fallacious. In the first place, revocation of an offer means some action on the part of the offeror by which the offer is re-called or revoked. It does not follow that the offer cannot be determined by action on the part of the offeree, and therefore while fully conceding to the appellant that a Code is exhaustive on matters with which it deals we do not see that there is any difference between the English and Indian Law on the question of the determination of an offer by its rejection by the offeree".

(1) (1840) 49 E.R. 132; 3 Beav. 334.
(2) [1926] A.I.R. Lah. 645.

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The learned Full Bench of the Small Cause Court referred to this Lahore Case *Nihal Chand* -v- *Amar Nath* (1) but distinguished it by observing that the circumstances were quite different from the circumstances in the case before us. I must agree with the learned Full Bench that the circumstances are different, though for reasons different from those given by the Bench. Both in the cases of *Hyde* -v- *Wrench* (2) and *Nihal Chand* -v- *Amar Nath* (1) the counter proposal made by the plaintiff had been definitely rejected by the defendant before the offer was renewed to close the transaction on the original terms. In the present case the defendants had not rejected the counter proposal of the plaintiffs before the plaintiffs communicated full acceptance of the proposal, Sec. 5 of the Indian Contract Act provides that the proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards. The illustration to the section makes the meaning clear. The illustration is as follows: "A proposes, by a letter sent by post, to sell his house to B. B accepts the proposal by letter sent by post. A may revoke his proposal at any time before or at the moment when B posts his letter of acceptance but not afterwards. B may revoke his acceptance at any time before or at the moment when the letter communicating it reaches A, but not afterwards". In this case, considering the counter-offer made by the plaintiff company in the letter of the 14th August, 1950 as a proposal, it must be held that the plaintiff company had revoked the proposal before it was either accepted or rejected by the defendant company, and thereafter within a reasonable time of the original proposal the plaintiff company communicated acceptance of the proposal by telegram which was confirmed by letter. If the defendant company after receiving the letter of the plaintiff company dated the 14th of August, 1950, containing the offer for purchase at Rs. 31/8/- per piece, had written back definitely rejecting the proposal before the acceptance reached them, then the case would have been similar to the case of *Hyde* -v- *Wrench* (2) *and Nihal Chand*

(1) (1840) 49 E R. 132; 3 Beav. 334.
(1) [2926] A I.R. Lah. 645.

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-v- *Amar Nath* (1) and the principles laid down in those cases would have been applied. In the present case, as already stated, the defendant company did not at once write back rejecting the counter proposal of the plaintiff company; before the defendant company had time to do so the plaintiff company themselves revoked that counter proposal and accepted the original proposal. Thus the facts are different and in the circumstances I must hold that there was a completed contract. It may be pointed out that in the Lahore case their Lordships did not apply the principle of *Hyde* -v- *Wrench* (2) as unquivocally applicable. They, no doubt, applied the principle, but they also dealt with the matter in an alternative way. They observed as follows: 'Even if the telegram of the defendant of the 11th November, be taken as containing an implied renewal of the offer of the 5th or implied statement of the fact that the offer of the 5th was still outstanding, the acceptance of the 16th was not in the circumstances a good acceptance. More than five days had elapsed since the 11th and we cannot hold that the offer of the 5th, even if renewed impliedly by the telegram of the 11th, was still standing on the 16th. Their Lordships hold in the circumstances of the particular case 3 days would be the reasonable time for acceptance or rejection of the contract, and therefore the offer had been revoked by failure to accept it within a reasonable time within the meaning of sec. 6 of the Indian Contract Act. Thus their Lordships made out an alternative case under sec. 6 of the Indian Contract Act.

The question whether a counter proposal amounts to rejection of the original proposal may be looked at from this point of view. If the counter proposal is accepted by the party which made the original proposal, necessarily the original proposal is superseded by the new proposal (counter proposal). If the counter proposal is rejected by the party which made the original proposal then also the original proposal cannot be deemed to be automatically revived. But if the counter proposal is withdrawn before it has been either accepted or rejected, it must be held that the original proposal stands unrejected, and the acceptance will be good provided

(1) [1926] A.I.R. Lah. 645.
(2) (1840) 49 E.R. 132; 3 Beav. 334.

it has been made within a reasonable time from the date of communication of the original proposal. In this case it was made within a reasonable time, as already stated, and therefore it must be found that there was a good and valid contract.

The next point urged by Mr. Das Gupta is that under the terms of sec. 38 of the Presidency Small Causes Courts Act, that Full Bench had no power to transmit the case for re-hearing on one issue only, namely the issue of assessment of damages. By sec. 38 of the Presidency Small Causes Courts Act the Full Bench may not only order a new trial but also alter, set aside or revise the decree or order upon such terms as it thinks reasonable. If the decree may be altered it is clear that finding on one issue may be revised, and where the remaining issues have not been decided the case may certainly be transmitted to the original court for decision. I cannot, therefore, accept the contention of Mr. Das Gupta that the Full Bench acted without jurisdiction in sending back the case for trial on the question of assessment of damages only.

The application, therefore, fails and the Rule is discharged. In the circumstances, however, no order is made for costs.

P. K. R. *Rule discharged.*

CIVIL REVISION.

Before Mr. Justice Renupada Mukherjee.

SYED ALI MONDAL

v.

KAZI GOLAM BARI AND OTHERS*

CIVIL.

1954.

July, 13.

Civil Procedure Code, Sec. 151—Mistake in the daily cause list committed by an officer of Court—Whether can be corrected under the section —Whether notice to opposite party necessary in such cases.

The notice on an opposite party in a sale-set-aside case U/S. 174(3) of the Bengal Tenancy Act not having been duly served, the Court recorded an order in the order-sheet directing the petitioner to take steps for service of fresh notice by registered post by 14th November, 1953. On that date the petitioner filed hajira but did not take any steps for service of fresh notice by registered post. The case was thereupon dismissed for non-prosecution. Five days later the petitioner filed an application under Sec. 151 of the Code of Civil Procedure for restoration of the case on the ground that in the daily cause list the case was noted only for taking steps. The munsif after consideration of the application set aside the order of dismissal and restored the case on the ground that the order for taking steps for service of fresh notice by registered post was not notified in the daily cause list and it was the duty of the Court to correct its own mistake. Upon this, an application was filed in the High Court challenging the propriety and legality of the munsif's order. A rule was granted on the said application.

Held that the daily cause lists are mentioned according to the Civil Court Rules and orders and parties generally take steps in judicial proceeding according to the entries made therein. As the note in the daily cause list was not specific and clear, the petitioner could not take suitable steps in the case The vague and insufficient entry being due to mistake on the part of the Court, the Trial Court was justified in setting aside the order of dismissal of the sale-set-aside case. The order of the munsif dismissing the case being the direct result of a mistake committed by an officer of the Court, the munsif was entitled to correct the mistake under sec. 151 of the Code of Civil Procedure. It was further held it was not necessary in the circumstances of the case to issue any notice to the opposite party. *Narayan Chettier & another V. P. C. Muthu Chettier & Ors.* (1) distinguished.

*Civil Revision Case No. 263 of 1954 against an order of the 2nd Court of the Munsif at Barasat (24-Parganas) dated 19-11-53.

(1) (1926) I L R. 50 Mad. 67.

CIVIL

1954.

Syed Ali Mondal
v.
Kazi Golam Bari.
July, 13.

Application Under Sec. 115 of the Civil Proceduce Code. The facts of the case will appear from the judgment.

Bhabesh Chandra Mitter for the Petitioner.
Barun Kumar Roy Chowdhury for the Opposite Party.
The judgment of the Court was as follows :—

Renupada Mukherjee, J. :—This Rule was issued at the instance of one Syed Ali Mondal under the following circumstances :—

Syed Ali Mondal was purchaser of some properties sold at a Court-Sale held in Rent Execution Case No. 649/1952 in the Court of the 2nd Munsiff, Barasat. Thereafter the judgment dabtors filed an application on 17th March, 1953 for setting aside the sale under section 174(3) of the Bengal Tenancy Act. An objection was filed to that petition by auction purchaser Syed Ali Mondal on 2nd May 1953. Notices were thereafter issued to the persons who were made opposite parties in the sale set aside case. But it appears that the notice was duly served on opposite party No. 5 who was subsequently made a party in that case. The result was that on the 3rd October, 1953. The Court recorded, an order in the order-sheet directing the petitioner to take steps for fresh service by registered Post Card upon the above opposite parties by the 14th November, 1953. On that date the petitioners filed hajira but did not take any step for service of fresh notice by registered post as they had been directed to do by the order of the previous date and so the Case was dismissed for non-prosecution. On the 19th November, 1953 the petitioners filed an application which purports to be one under section 151 of the Code of Civil Procedure for restoration of the case to file on the ground that in the daily cause list the case was noted only for taking steps. It appears that this application was shown to the learned pleader who had till then been acting on behalf of Syed Ali Mondal and he noted in the margin : "Seen strongly objected to". On the same day, viz. on 19th November, 1953, the Court duly considered this application and recorded an order setting aside the order of dismissal for non-prosecution and restoring the case to file. Among other observations it was stated by the learned Munsiff that the order passed in order sheet of the case on the 3rd. October,

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1953 for issuing fresh notice by registered post was not notified to the party in the daily cause list and so the prayer of the petitioners for restoration of the case could not be refused because it was the duty of the Court to correct its own mistake.

The present application has been filed in this Court challenging the propriety and legality of the above order.

Mr. Mitter appearing on behalf of the petitioner made several submissions before me. He contended in the first place that there was really no mistake on the part of the Court because the case was mentioned in the daily cause list and it was the duty of the judgment debtor's pleader to refer to the order-sheet and to take such steps as the petitioners had been directed to take by the order dated 3rd. October, 1953. In my judgment; this contention of Mr. Mitter cannot be accepted. The daily cause lists are mentioned according to the Civil Rules and orders and parties generally take their steps in judicial proceedings according to the entries made therein. The fact that in the daily cause list, the judgment-debtors were directed only to take steps must have misguided them. The order-sheet of the trial court shows that as a matter of fact the petitioners did file their hajira on 14th November, 1953, on which date the Miscellaneous case was dismissed for non-prosecution. As the note in the daily cause list was neither specific nor clear, the petitioner could not take suitable steps in the case. The learned Munsiff also thought that the above entry in the daily cause list did not enable the petitioners before him to take the required steps. He further thought that the vague and insufficient entry was due to a mistake on the part of the Court. In these circumstances, I am of opinion that the trial court was justified in not allowing the judgment-debtors to be prejudiced in any way by an omission on the part of the court.

The next point urged on behalf of the petitioner by Mr. Mitter was that in any case this was not a matter which could be rectified under section 151 of the Code of Civil Procedure and that the judgment-debtors could have preferred an appeal for obtaining proper relief. I do not agree with this

contention because the order of the Munsiff dismissing the case for non-prosecution was the direct result of a mistake committed by some officer of the court. That being the case, the court could grant a relief to the judgment-debtors and correct its mistake under the provisions of section 151 of the Code of Civil Procedure.

Lastly it was contended by Mr. Mitter that in any case the order in question should not have been set aside and the case should not have been restored to file without giving a formal notice to his client. In support of this contention Mr. Mitter drew my attention to the case of *Nârâyan Chettiar and another* -v- *P. C. Muthu Chettiar & ors* (1). In that case an application for execution of a decree was dismissed owing to the absence of the decree-holder's pleader on the date of hearing. On the same day, the application was restored on the application of the pleader without notice to the judgment-debtors. It was, therefore, held that the order passed without notice was not merely irregular but illegal and the judgment-debtors were not bound by it. The facts of the case cited by Mr. Mitter are quite different from the facts of the present case. In the case cited by him the execution case was dismissed owing to the absence of the decree-holder's pleader. There was no omission or mistake whatsoever on the part of the court. In the present case, the judgment-debtors who were petitioners before the trial court filed their hajira on the date in question but they could not take requisite steps owing to a vague and insufficient entry in the daily cause list which was prepared by an officer of the court and from which pleaders and their mohurers generally make their tadbirs in suits and other proceedings. The order whereby the Miscellaneous case was dismissed for non-prosecution appears to be the direct result of the above misleading entry. In these circumstances, it was necessary to issue any notice to the other party and the court was entitled to correct a mistake which was due to the laches of its own officer. Moreover the record would show that notice in some form was ac-

(1) (1926) I.L.R. 50 Mad. 67.

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tually issued and the application which was filed on 19th November, 1953, for restoration of the case was actually shown to the pleader who was acting on behalf of the petitioner of this court. That being the case, there is no ground for sending back the application for fresh hearing by the Munsiff after giving formal notice to the present petitioner, as was prayed for on this behalf.

On the whole I do not find any justifying reason for interfering with the order passed by the learned Munsiff which seems to have been passed under section 151 of the Code of Civil Procedure after due exercise of his jurisdiction.

The Rule is, accordingly, discharged.

In the circumstances of the case I do not make any order as to costs.

Let the records be sent down to the court concerned at a very early date.

Rule discharged.

P.K.D.

APPELLATE CIVIL.

Before Mr. Justice K. C. Chunder.

BINDU BASHINI DASI

v.

HEM CHANDRA DUTTA*

CIVIL.

1954

February, 18.

West Bengal Premises Rent Control Act, 1950, Sec. 12—Waiver of the right to eject in consequence of tenant's sub-letting before enactment of the Section—If new right can be created by the Section—Retrospective operation of an Act.

Section 12 of the West Bengal Premises Rent Control Act, 1950, gives no new right of ejectment to a landlord which he did not possess under the Transfer of Property Act or under the general law of the land. The Rent Control legislation places certain bars to a landlord getting a decree in ejectment and contains certain provisions as to where such bar is to be considered as removed. Therefore, where the landlord had before the enactment of Section 12 of the West Bengal Premises Rent Control Act, 1950, waived the right obtained by him in consequence of subletting by the tenant and had no right to eject the tenant on the date of the enactment of Section 12, the landlord did not after the enactment of Section 12 acquire any new right to eject under Section 12 in consequence of the sub-letting.

As regards the question whether the Act of 1950 had got a retrospective operation in with holding relief to tenant where tenant had sublet the major part of the premises for more than seven months before the Act of 1950 came into force, no Act is given retrospective operation unless these are actual words in the Act giving it such operation, or the Court is compelled by necessary implication to give such an interpretation to the wordings of the Act. The general rule is that an Act is interpreted operating from the time when it came into force and applying to circumstances which came into existence since then. Therefore the proper interpretation of Sub-Clause (c) to the first proviso of Section 12(1) will be that the sub-letting referred to is not before the Act of 1950; but where the tenant sublets since the Act of 1950 came into operation and such sublease continued for more than seven months the tenant is to lose the protection of the Rent Control legislation.

* Appeal from Appellate Decree No. 237 of 1953 against the decree of Sri S. C. Sen Gupta and Sri S. K. Roy, Judges, Special Appellate Bench, Court of Small Causes Calcutta in Appeal No. 917 of 1952, dated 25th of November, 1952 affirming the decree of Sri S. C. Biswas, Judge, 3rd Bench, Court of Small Causes, Calcutta dated 16th of July, 1952.

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Appeal by the tenant against an appellate decree of the Court of Small Causes, Calcutta, passed in suit for ejectment.

The material facts will appear from the judgment.

Nirmal Chandra Chakravorti and Bhabanath Dutt for the Appellant.

Debi Prosad Dutt and Sourendra Kumar Ghosh Choudhury for the Respondent.

The judgment of the Court was as follows :—

February, 18.

K. C. Chunder, J. :—This is an appeal against an appellate decree of the Court of Small Causes, Calcutta, affirming that of the Third Bench of the same court. The defendant is the appellant.

The facts are not in dispute and they have been admitted by the learned Advocate for the respondent at the hearing of the appeal. The facts are that in 1932 a lease was granted to the tenant for a period of eight years and there were various terms about the tenants' power to demolish the whole structure raise new structures etc. as also it would appear impliedly that the tenant had the power to assign the lease as assignee is also mentioned. But it is immaterial for me to interpret the lease to find out whether there was any implied power of sub-letting. It appears from the evidence on behalf of the defendant that since 1934 almost the whole of the premises after certain additional structures had been put up were sublet. It is the evidence on behalf of the plaintiff himself that since his purchase in 1942 the plaintiff knew of the subletting which had been long before his purchase and he did not enforce his rights, if any. The court below has also come to the finding that the plaintiff had knowledge of the subletting which was long before his purchase. With this knowledge, instead enforcing any right which he may claim against the tenant for any alleged forfeiture of the tenancy the landlord fought two rent fixation cases with him taking up the position that he was still the tenant. There is, therefore, no escape from the position that whatever

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rights if any, the landlord had obtained by the tenant's sub-letting the premises, the landlord had waived his rights and had ratified the act. In 1951, after the Act 1950 had been passed the landlord filed the present suit on the ground that the tenant had under sub clause (c) to the first proviso of section 12(1) incurred a forfeiture of the lease and the landlord had the right to eject him. The courts below have accepted that contention.

The contention in the present case is not sustainable in law. The first thing that is to be noticed is that section 12 gives no new right of ejectment to a landlord which he did not possess under the Transfer of Property Act and the general law of the land. The Rent Control Legislation places certain bars to a landlord getting a decree in ejectment and contains certain provisions as to when such bar is to be considered as removed. Theremore as before the enactment of section 12 the landlord, having waived any alleged forfeiture of the lease by sub-letting by the tenant. had no right to eject the tenant, he got no new right under section 12. Secondly, the court below have gone into lengthy discussion over the corresponding section namely section 11 of the Rent Control Act of 1948 without noticing that that the law is substantially different under the two Act. It is unnecessary for me to dilate at length on the difference. Under the present Act there must be a sub-letting and this sub-letting must continue for a period of seven monhs and be of the major part of the premises. The question is whether this Act had got a retrospective operation in withholding relief to tenant where tenant had sublet for seven months and more before this act came into force. No Act is given retrospective operation unless there are actual words giving it such operation or by necessary implication the court is compelled to give such an interpretation to the wordings of the Act. The general rule is that an act is interpreted as operating from the time when it came into force and applying to circumstances which came into existence since then. Therefore the proper interpretation of sub clause (c) to the first proviso of section 12(1) will be that the sub-letting referred to is not before the Act of 1950 but where the tenant sublets since the Act of 1950 came into operation and such sub-let-

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ting continued for seven months the tenant is to lose the protection of the rent control legislation. Therefore in the present case it must be considered that the tenant has not lost the protection given by the Rent Control Legislation. It must further be pointed out, as I have already done, that the question of such protection does not arise in the present case as the landlord had no right under the general law to sue the tenant in ejectment since he had waived any forfeiture that might have been incurred. For both these reasons the court below erred in granting the landlord a decree in ejectment. The decree must be set aside and the suit of the landlord must be dismissed with costs in all the courts.

It is unnecessary in view of the order I have passed to consider the alternative application in revision. A Division Bench of this court has already held that in a case of ejectment in the Court of Small Causes, the proper remedy is by way of a second appeal.

Leave to appeal under clause 15 of the letters patent is prayed for and is refused.

Appeal allowed.

P.K.D.

CRIMINAL REVISION

Before Mr. Justice P. N. Mookerjee.

CRIMINAL.

1955.

January, 12.

GUM BAHADUR
v.
THE STATE.*

West Bengal Security Act, 1950—Sub-Secs. (2) and (3) of Sec. 6 and Sec. 38—Sec. 38, if ultra vires the constitution—Defect of Sec 38, if cured by specification of names of Delegates.

The petitioner was placed on trial before a First Class Magistrate at Asansol on a charge of violating the provisions of Sub-Sec. (3). of Sec. 6 of West Bengal Security Act, 1950. He was convicted by the Magistrate. His appeal to the Sessions Judge was dismissed. Thereafter the present rule was granted. The principal point which required consideration in the present rule was whether a notice issued under sub-Sec (3) of Sec. 6 of West Bengal Security Act, 1950, by a person, to whom the power to issue such notice had been delegated under Sec. 38 of the Act, was valid in law It was held that Sec. 38 of the Act is *ultra vires* the constitution. The defect of Sec. 38 is not cured by naming specifically the delegates in the order of delegation.

Khagendra Nath De v. District Magistrate of West Dinajpur (1), *Jatish Chandra Ghose v. B. K. Sinha* (2) *and Janab Atar Ali Sahaji v. Joint Secretary to the Government of West Bengal* (3) relied on.

Application for Revision under Secs. 435 and 439 of the Code of Criminal Procedure by the Accused.

The material facts will appear from the judgment.

Amaresh Chandra Ray, Jnanendra Mohan Dey and Subiman Ghosh for the Petitioner.

Samarendra Nath Mukherjee for the State.

* Criminal Revision Case No. 862 of 1954 against the order passed by C. L. Choudhury, Magistrate, 1st Class, Asansol, on 8.3.1954, convicting and sentencing the accused under Section 6 of the West Bengal Security Act, 1950, upheld in appeal by the Sessions Judge, Burdwan.

(1) (1951) A.I.R. Cal. 3; (1950) 55 C.W.N. 53.
(2) (1950) 55 C.W.N. 104; (1951) A.I.R. Cal. 504;
(3) (1950) 55 C.W N. 94; (1951) A.I.R. Cal. 322;

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The judgment of the Court was as follows—

P. N. Mookerjee, J. :—The Petitioner in this case was placed on trial before Sri C. L. Choudhury, Magistrate, First Class, Asansole, on a charge of violating the Provisions of Sub-Section (3) of Section 6. of West Bengal Security Act, 1950, on the ground that he did not comply with the order, dated August, 24, 1953, of the Works Manager Mr. H. H. Drake, for regulating the conduct of the Permit Holders in a protected place, namely, the Indian Iron and Steel Compony's Works at Burnpur, declared to be a protected place under Notification No. 5306P, dated August 22, 1953. He was convicted by the learned trying Magistrate and sentenced to pay a fine of Rs. 200/-; in default, to suffer rigorous imprisonment for six weeks. His appeal to the Sessions Judge was dismissed. Thereafter he obtained the present Rule.

It appears that the Indian Iron and Steel Company's Works at Burnpur was declared a Protected Place under Notification No. 5306P, dated August 22, 1953, by the State Government. In the said Notification the Works Manager of the said company, along with certain other persons, named therein, was authorised to grant permission under sub-section (2) of section 6. of the West Bengal Security Act, 1950. On the submissions, made before me, this delegation appears to have been made under section 38 of the Act. On August 24, 1953, the Works Manager purported to issue a notice (Ex. 3) under sub-section (3) of the said section 6. for regulating the conduct of persons who were granted permission under sub-section (2) in regard to the Protected Place, namely, the Indian Iron and Steel Company's Works at Burnpur. This was obviously done on the strength of the delegated authority, referred to above. The petitioner was an employee of the aforesaid company and the charge against him is that he constructed the above notice of the Works Manager, issued under section (3) of section 6.

The principal point which requires discussion in this

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Rule is whether the said notice, issued by the Works Manager, was valid in law so as to justify a prosecution and conviction for contravention of the same. Mr. Roy, appearing on behalf of the petitioner, has drawn my attention to two cases of this Court, *Khagendra Nath Dey* -v- *District Magistrate of West Dinajpur* (1) *and Jatish Chandra Ghose* -v- *B. K. Sinha* (2) where it was held that "section 38 of the West Bengal Security Act, 1950, under which the State Government is empowered to delegate its power or duty, conferred or imposed upon it by any Provision of the Act, is *ultra vires* the Constitution". That was also the view which appears to have been taken by another Division Bench of the Court in the case of *Janab Atar Ali Saliaji* -v- *Joint Secretary to the Government of West Bengal* (3). In spite of these decisions, no action appears to have been taken by the authorities concerned—at least none is shown to me, to counteract their adverse effect. The Bench decisions are binding upon me and I must, therefore, proceed on the footing that the State Government has no such power of delegation in law as was attempted to be conferred upon it by section 38.

The delegation in the present case to issue the order (notice) under sub-section (3) of section 6 for regulating the conduct of persons, holding permits under sub-section (2), was obviously made under section 38, because no other provision was or could be pointed out to me in support of the said delegation. The result at once follows that the notice (order), issued by the Works Manager on August 24, 1953, which is Ext. 3 in the case and for contravention of which the petitioner was placed on trial, is bad in law. There cannot, therefore, be any prosecution or conviction for such contravention, if any.

On behalf of the State, an attempt was made *to distinguish the cases* cited and to limit the scope of their authority but the argument is *unconvincing* and I do not feel impressed by it. It is idle to contend that those decisions are distinguishable as the acts, there complained of, were of a different nature, namely, subversive acts under another section

(1) [1951] A.I.R. Calc. 3; 55 C.W.N. 53.
(2) [1951] A.I.R. Calc. 404; 55 C.W.N. 104.
(3) [1951] A.I.R. Calc. 322; 55 C.W.N. 94.

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(sec. 21) of the Act. The basic reason, underlying the decision on this point [vide *Khagendra Nath De -v- District Magistrate of West Dinajpur* (1) per Harries, C. J.] is wide enough to cover the present case. I do not also agree with the learned Sessions Judge that the defect of sec. 38, as pointed out by this Court, is cured by naming specifically the delegates in the order of delegation. As I read the decissions cited, they pronounced section 38 to be *ultra vires* and invalid while considering delegations in favour of persons (delegates) as much specifically named as in the present case and inspite of such naming and specification.

I hold, therefore on the authority of those decisions, that section 38 of the Act, is *ultra vires* and delegation under that section is invalid and, that being so, the notice (Ex. 3) has no force in law and the petitioner's conviction and sentence for contravention of the same cannot stand.

In the above view of the matter, it is perfectly clear that the petitioner was wrongly convicted and sentenced by the learned trying Magistrate and his appeal also was wronly dismissed by the learned Sessions Judge. The said conviction and sentence must, therefore, be set aside. I order accordinly.

In the circumstances of this case, I do not think that interests of justice require that the petitioner should be re-tried on any amended charge.

I accordingly, make this Rule absolute and acquit the petitioner.

The fine, if paid, may be refunded.

Conviction and sentence set aside.

P. K. D.

(1) (1950) 55 C.W.N. 53 at p. 59.

CRIMINAL REVISION.

Before Mr. Justice S. C. Lahiri and Mr. Justice J. P. Mitter.

CRIMINAL.

1954.

May, 13.

SUSETANNESSA BIBI

v.

CHINTAHARAN DAS *

Personal undertaking given to court—Failure to comply with—When brings the case within the mischief of contempt proceeding.

A Second Appeal was disposed of in terms of a joint petition of compromise filed by the parties in Court. It was provided in the petition that the petition would form a part of the decree of the Court. It was supported by an affidavit sworn by the appellant himself and by a person acting on behalf of the respondent. Paragraph 2 of the petition was in the following terms: "The aforesaid appellant gives a personal undertaking to the Hon'ble Court that he will give quiet and vacant possession of the premises, the subject-matter of the suit and appeal, to the aforesaid respondent by the 25th of the February, 1954".

The appellant not having given quiet and vacant possession on or before the 25th February, 1954, the respondent filed one application before the High Court, alleging that though the appellant undertook to give quiet and vacant possession of the premises by the 25th of February, 1954, he had failed to do so and accordingly praying for a rule upon the appellant to show cause why he should not be committed to prison for breach of the personal undertaking given to the High Court. It is settled law that breach of an undertaking given to a Court by a person in a pending proceeding on the faith of which the Court sanctions a particular cause of action is misconduct amounting to contempt.

Sukumar Mitra v. Tara Sankar Ghose (1), distinguished, because in that case there was an undertaking given by the tenant to vacate the premises by a particular date and there was a further clause that in case the tenant failed to vacate within the prescribed period the landlord would be entitled to execute the decree for possession. Having regard to the fact that the consequences of default were provided for in the undertaking it was held that the undertaking given in that case was not an unconditional or unqualified undertaking but was a qualified undertaking, a breach of which could not bring the case within the mischief of contempt proceedings. In the present case the opposite party

* Criminal Misc. Case No. 76 of 1954.

(1) (1952) 56 C.W.N. 580.

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(the appellant) was convicted and sentenced to simple imprisonment and to pay fine.

Criminal Misc. L Rule to show cause why the opposite party (the appellant) should not be convicted and sentenced for breach of personal undertaking given to Court.

The material facts will appear from the judgment.

Charu Chandra Ganguly and Prafulla Kumar Chatterjee for the Petitioner.

Jitendra Nath Guha and Satya Priya Ghose for the Opposite Party.

The judgment of the Court was as follows :—

S. C. Lahiri, J.:—This Rule was issued on the opposite party to show cause why he should not be committed to prison for contempt of this Court for breach of a personal undertaking giving by him to this Court in Second Appeal No. 1461 of 1953. The facts relevant for the purposes of this Rule may be briefly stated as follows:—The Petitioner Susetannessa Bibi instituted a suit for ejectment against the opposite party Chintaharan Das in respect of premises No. 37/D. Surendra Nath Banerjee Road. The petitioner succeeded in getting a decree for ejectment in the Courts below and against the decree of the Lower Appellate Court the opposite party Chintaharan Das filed a second appeal which was registered and numbered as S. A. 1461 of 1953. That second appeal came up for hearing under Order 41, Rule 11 of the Code of Civil Procedure before this court on the 1st of December, 1953, on which date the following order was recorded by the court: "This appeal will be heard. The records need not be sent for and the usual notices need not issue, as it is represented to us that Mr. Charu Chandra Ganguly, Advocate, has got instruction to appear for the sole respondent.

Mr. Ganguly is permitted to enter appearance for the sole respondent.

This appeal is disposed of in terms of the joint petition of compromise filed by the parties in court to-day. This

petition will form part of the decree of this court".

The joint petition of compromise which was filed by the parties was supported by an affidavit by Chintaharan Das on behalf of the appellant and by Abdul Gani on behalf of the respondent. Paragraph 2 of the petition runs as follows: "The aforesaid appellant gives a personal undertaking to the Hon'ble Court that he will give quiet and vacant possession of the premises in question (which is the subject-matter of the suit and appeal) to the aforesaid respondent by the 25th of February, 1954". Paragraph 3 of the petition permits the respondent to withdraw the amount deposited by the appellant as cost. These are the only two terms upon which the appeal was allowed to be compromised on the 1st of December, 1953. Thereafter, the respondent Susetannessa Bibi filed an application before us alleging that though the appellant Chintaharan Das undertook to give quiet and vacant possession of the premises by the 25th of February, 1954, he had failed to do so and accordingly applied for a Rule upon the opposite party Chintaharan Das to show cause why he should not be committed to prison for breach of the personal undertaking given to this court. It appears that the opposite party Chintaharan Das addressed a letter to the petitioner Susetannessa Bibi bearing the date 26th February, 1954, in which he stated that he had vacated the house after informing the petitioner "verbally". In spite of his request to take possession of the house as well as the articles of furniture neither the petitioner nor his representative turned up and as such the opposite party was compelled to keep the articles under lock and key. This letter has been filed by the petitioner with his petition and it is marked as annexure "B". To this letter, the petitioner sent a reply on the 28th February, 1954, denying the allegation that the opposite party was prepared to give vacant possession of the premises on or before the 25th of February, 1954. The petitioner further alleged that upon enquiry she was satisfied that the premises were still in the possession of the opposite party who had not yet vacated the same and in this letter the petitioner charged the opposite party with having taken no step to comply with the terms of the solenama filed in this court.

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The opposite party in showing cause before us has stated that he had sub-let a considerable portion of the premises in dispute long before the institution of the suit for ejectment and that the petitioner Susetannessa Bibi was aware of this fact. It is curious that this allegation was not made in the letter which was addressed by the opposite party to the petitioner on the 26th February, 1954, nor was it mentioned in affidavit which was sworn to by the opposite party in support of the petition of compromise filed in this court on the 1st December, 1953. If the allegation made by the opposite party to the effect that he had sub-let a considerable part of the premises long before the institution of the suit and therefore it was not possible for him to give vacant possession to the petitioner on or before the 25th February, 1954, be correct, we must hold that the opposite party was guilty of having fraudulently suppressed this fact from this court when he gave a solenama undertaking to this court to vacate the premises in dispute on or before the 25th February, 1954. The letter which the opposite party wrote to the petitioner on the 26th February, 1954, in our opinion, is a mere eye-wash and was written for the purpose of creating evidence in his favour that he had complied with the terms of the undertaking given by him in his affidavit in this court.

We have therefore no doubt in our mind that the opposite party Chintaharan Das in guilty of a deliberate breach of the personal undertaking given by him to this court in his affidavit dated the 30th November, 1953. It is settled law that breach of an undertaking given to a court by a person in a pending proceeding on the faith of which the court sanctions a particular course of action is misconduct amounting to contempt. In the case before us on the faith of the undertaking given by the petitioner the appeal filed by him was disposed of in terms of the petition of compromise under the provisions of Order 23, Rule 3 of the Code of Civil Procedure. Mr. Guha, appearing for the opposite party strongly relied upon the decision of this Court in the case of *Sukumar Mitra -v- Tarasankar Ghose* (1), to which I was a party. That was a case where there was an undertaking given by

(1) (1952) 56 C.W.N. 580.

the tenant to vacate the premises by a particular date and there was a further clause that in case the tenant failed to vacate the premises in question within the prescribed period the landlord would be entitled to execute the decree for possession. Having regard to the fact that the consequences of default were provided for in the undertaking, it was held that the undertaking given in that case was not an unconditional or unqualified undertaking but was a qualified undertaking, a breach of which could not bring the case within the mischief of contempt proceedings. It was further held in that case that the court had some doubts whether in that case there was an undertaking given to the court because there was room for resonable doubt in the mind of the tenant that he had not given an unqualified undertaking to the court. In the case before us, however, there can be no doubt that the undertaking given by the opposite party Chintaharan Das was an unconditional and an unqualified undertaking. The Consequences of default are not provided for either in the undertaking or in the order passed by the Court. In these circumstances, we are unable to hold that the decision in *Sukumar Mitra's Case* (1), helps the opposite party.

Mr. Guha also relied upon the fact that the undertaking given by the opposite party was not recorded in the order of the court and therefore the conduct of the opposite party in violating the undertaking did not amount to contempt. We are unable to accept this argument. By the order which was passed by the court the undertaking given by the opposite party in his affidavit was made a part of the decree and there can be no doubt that the court disposed of the appeal on the faith of the undertaking given by the opposite party in his affidavit.

For these reasons we have reached the conclusion that the opposite party Chintaharan Das is guilty of breach of a personal undertaking given to this court which amounts to contempt.

Mr. Guha, appearing for the opposite party, has requested

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us to adjourn the case for the period of one month to enable the opposite party to comply with the undertaking given by him to this court in his affidavit dated the 30th November, 1953. In that undertaking the opposite party promised to vacate the premises by the 25th February, 1954. From that date he has had a period of two months and a half and as he has not been able to comply with the undertaking during this period, we find no reason for holding that any useful purpose will be served by allowing him to comply with the undertaking by adjourning this case for a further period of one month.

We accordingly convict the opposite party Chintaharan Das for having committed an act of contempt and sentence him to simple imprisonment for three months and to pay a fine of Rupees one thousand.

Let a writ of arrest be drawn up by the Registrar, Original Side and placed before us immediately. The Registrar is to act on a signed copy of the operative part of this order.

All expenses and charges for issue of the writ and for conveying the prisioner to the jail will be borne by the petitioner.

J. P. Mitter, J:—Iagree.

P. K. D. *Rule made absolute.*

APPELLATE CIVIL.

Before Mr. Justice R. P. Mookerjee and Mr. Justice Renupada Mukherjee.

SM. CHINMOYEE BAXI

v.

RAJA SANKARI PROSAD SINGH DEO & ORS.*

CIVIL.

1954.

August, 19.

Composite Deed—One part recording dissolution of partnership—The other part charging a property with the payment of Rs. 10,000/- — Latter part if a Bond—Section 2(5) (a) of the Indian Stamp Act—Stamp duty payable on such deed—Section 5 and Article 15 of Schedule 1 of the Indian Stamp Act.

Section 36 of the Indian Stamp Act—if applies to certified copy of Insufficiently stamped deed—Certified copy of such deed if admissible in evidence when the original deed is lost and untraced.

When a deed is comprised of two distinct matters—one being the dissolution of partnership business and the other being an obligation entered into by one party to pay Rs 10,000/- to the other party, for the payment of which sum a property was charged, it is the latter element which invests the deed with the character of a bond as defined in Section 2(5) (a) of the Indian Stamp Act. As the deed was both an agreement for dissolution of partnership as well as a bond, under Section 5 of the Indian Stamp Act it was chargeable with an aggregate of duties with which two such separate instruments would be chargeable. Under Article 15 of Schedule 1 of the Indian Stamp Act, the proper duty payable on the bond was Rs. 75/-. The original document was insufficiently stamped as the total duty paid was Rs. 20/- only.

Section 36 of the Indian Stamp Act applies only to original documents which have been insufficiently stamped. Certified copies of such documents do not come within its scope. As such, certified copies of insufficiently stamped documents are not admissible in evidence.

Appeal by the plaintiff from Original decree dismissing a suit for recovery of a sum of Rs. 10,000/- with interest.

The material facts will appear from the judgment.

Sib Kumar Das and Dinesh Chandra Bose for the Appellent.

Krishna Chaitanya Ghose for the Respondent No. 1.

Pramotha Nath Mitra and Chandra Narayan Laik for the

* Appeal from Original Decree No. 119 of 1949 against the Decree of Sri A. K. Sen Gupta, Additional Sub. Judge of Zillah Burdwan at Asansole in T. S. No. 7/11 of 1948/1949 dated 14.2.49.

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August, 19.

Respondent No. 2 and

Bon Behari Mukherjee for the Respondents Nos. 3(a) to 3(c).

The judgment of the Court was as follows :—

Renupada Mukherjee, J. :—The subject matter of this appeal lies within a very limited compass, viz, whether the certified copy of a certain deed, the original of which is lost and untraced and which was insufficiently stamped, can be admitted in evidence and used by the plaintiff appellant.

In order to understand how this controversy which is a controversy on a pure question of law has arisen between the parties it will be necessary to set out only the following facts about which there is no dispute. One Anandamoyee Sarkar who was mother of Chinmoyee Bakshi, plaintiff in Trial Court and appellant of this appeal, was the owner of certain collieries, and as she had financial difficulties in running them, she took financial and other assistance from her daughter, the plaintiff, who set up plants and machineries in the collieries and was admitted as a partner of her mother in the colliery business. A deed of partnership was accordingly executed by the parties on the 11th December, 1937. The partnership was subsequently dissolved by an agreement for dissolution of the partnership executed by the mother and the daughter on the 13th March, 1938.

The principal terms of this deed for dissolution of partnership were the following : First, in lieu of the dissolution Rs. 20,000/- was to be paid to Chinmoyee out of which Rs. 10,000/- was paid at the time of execution of the deed of dissolution and the balance of Rs. 10,000/- was to be paid within three months from that date. Secondly, the colliery property of the mother was kept in charge as security for payment of the above sum of Rs. 10,000/-. It was furthe agreed between the parties that by payment of the sum of Rs. 10,000/- a handnote which Anandamoyee had executed in favour of plaintiff's husband would become satisfied.

The plaintiff's case was that the above sum of Rs. 10,000/- was not paid. She accordingly instituted the present suit in the Trial Court for recovery of the money with interest according to the terms of the deed of dissolution of the partnership.

Anandamoyee having died before the institution of the suit, her son Asokemohan Sarkar and another daughter Renubala Biswas were made defendants No. 3 & 4 in the Trial Court. Asokemohan having died during the pendency of the suit in the Trial Court his heirs were substituted in his place as defendants Nos. 3(a) to 3(c).

Defendant No. 2, New Birbhum Coal Co. Limited, was made a party on the allegation that it had acquired an interest in the colliery property subsequent to the execution of the deed of dissolution of partnership, and defendant No. 4 Raja Kalyani Prosad Singh Deo was made a party because he was going to put a decree to execution which was likely to affect the charge of the plaintiff prejudicially.

Various defences were taken in the Trial Court by various sets of defendants which need not be considered in detail here. The plaintiff relied on the deed of dissolution of partnership, dated the 13th March, 1938, for the success of her claim. She was not in a position to produce the original deed because it was stated to be lost or untraced. A certified copy of the deed was produced in Trial Court in lieu of the original document. The learned Subordinate Judge held upon the objection of some of the defendants the original document was insufficiently stamped, and so the certified copy was not admissible in evidence for proving the plaintiff's claim, and in this view of the matter, the suit was dismissed by him. So the plaintiff has preferred this appeal.

The appeal in now being resisted by defendant No. 2. New Birbhum Coal Co. Ltd., and by the heirs of Asokemohan Sarkar who have entered appearance separately.

Mr. Das, appearing on behalf of the appellant urged there contentions before us.

In the first place, Mr. Das contended that the document on which the plaintiff's claim was founded was in substance and effect an agreement for dissolution of partnership business, and so under article 46 of schedule I of the Indian Stamp Act, the proper stamp duty payable on it was Rs. 10/- in West Bengal. The certified copy of the deed shows that the original was drawn up in two stamp papers of the value of Rs. 10/- each. The above contention of Mr. Das cannot be accepted, because on an examination of the deed of dissolution I find that it is not simply a deed for dissolution

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of a partnership business. It is a composite instrument comprising two distinct matters—one matter being the dissolution of a partnership business and the other matter being an obligation entered into by Anandamoyee to pay Rs. 10,000/- to plaintiff for which she kept her colliery property under charge. This latter element invests the deed with the character of a bond as difined in section 2(5a) of the Indian Stamp Act. The definition runs as follows :—

" 'bond' includes—

(a) any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is perfomed, or is not performed, as the case may be,

(b) any instrument attested by a witness and not payable to order or bearer, wherby a person obliges himself to pay money to another;.....".

There can, therefore, be no doubt that the document under consideration was both an agreement for dissolution of a partnersip and a bond, and so under section 5 of the Indian Stamp Act. it was chargeable with an aggregate of duties with which two such separate instruments would be chargeable. As a bond the amount of duty payable upon the insment was Rs. 75/- under article 15 of schedule I of the Indian Stamp Act. As the total duty paid was Rs. 20/- only there can be no question that the original document was insufficiently stamped, and so the first contention urged on behalf of the appellant by Mr. Das must fail.

The second contention put forth on behalf of the appellant was that the certified copy having once been admitted in evidence by the Trial Court and marked an exhibit, its admissibility cannot now be questioned at the appellate stage in view of the provisions of secion 36 of the Indian Stamp Act. This contention is equally without any substance because section 36 of the Indian Stamp Act applies only to original documents and not to certified copies. This is the view taken by Their Lordships of the Judicial Committee in Privy Council Case reported in *Venkata Sevta Chalapati -v- Sm. Inuganti Bhavayyammi Garu* (1). This was no doubt a decision under the old Stamp Act of 1879, but

(1) (1899) 4 C.W.N. 117.

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the decision mainly turns on the interpretation of section 34 of that Act which substantially corresponded with sections 35 and 36 of the present Act of 1889. The following observations may be pertinently quoted from the above judgment:—

"Accordingly, the only question arising for decision in this appeal is,—Whether the courts below were right in holding that the provisions made by the Act of 1879, for the case of deeds either unstamped, or insufficiently stamped, have no application, when the original deed, which ought to have been stamped or was insufficiently stamped has not been produced? That is a question which must depend upon the terms of the statute itself.

Their Lordships are satisfied, by an examination of its clauses, that the construction of the Act of 1879, adopted by the court below is correct".

Mr. Das on behalf of the appellant drew our attention to a case of the Rangoon High Sourt reported in *Maung Po Htoo* -v- *Mam Ma Gyi* (1). In that case an attempt was no doubt made to distinguish the Privy Council Case on the ground that section 36 of the present Stamp Act applied not only to original documents, but also to certified copies in the matter of admission by way of evidence. In my judgment, the Privy Council Case has not been correctly interpreted in the Rangoon Case. In the Privy Council Case an attempt was made by a party to offer secondary evidence of an insufficiently stamped deed of gift which was not produced, by tendering a draft of the original deed, and the Privy Council held after considering section 34 of the Old Act which practically corresponded to sections 35 and 36 of the present Act that secondary evidence in such a case was not permissible. This being the scope of the decision of the Privy Council Case, I must say with great respect to the learned judges of the Rangoon High Court that their interpretation of the above case is not correct and cannot, therefore, be accepted. Such a view of the Rangoon case has been taken in another case reported in *Bhagawan Das Laha Gangaram* -v- *Amardas Shamdas* (2). I, therefore hold that certified copies of original deeds do not

(1) (1926) 101 I.C. 198
(2) [1938] A I R. Peshawar 82.

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come within the scope of section 36 of the Indian Stamp Act. This view is further warranted by the section itself which run as follows:—

"Where an instrument has been admitted in evidence, such admission shall not, except as provided in section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped."

It goes without saying that the question whether a document has been "duly stamped" or not can arise only with regard to an original deed and not its certified copy which does not require stamp as an instrument beyond the necessary fees for copying and certifying. The second contention urged by Mr. Das must also fail.

The last contention urged on behalf of the appellant was that in order to avoid hardship to the appellant effect might be given to the deed in question as a deed of dissolution of partnership, and the other part of the deed which required addiional stamp duty might be excluded. This contention cannot be upheld because it is exactly on the other portion of the deed; *viz.*, the bond-portion that the claim of the plaintiff is based. Unfortunate as the result may be, this prayer of the plaintiff appellant cannot be allowed because the original document was insufficiently stamped and is not being produced for validation by payment of requisite stamp duty and penalty. The result is that the certified copy of the deed on which the suit is based becomes inadmissible in evidence, and I must hold that the Trial Court has rightly dismissed the suit of the plaintiff.

In the result, the appeal must fail. It is accordingly dismissed and the judgment and decree of the Trial Court are confirmed. In view of the circumstances of the case I direct that each set of contesting respondents, *viz.*, defendant No.2 and defendants Nos. 3(a) to 3(c), will get three gold mohurs as consolidated costs.

P. K. R. *Appeal dismissed.*

SUPREME COURT.

Before Mr. Justice Bijan Kumar Mukherjea,
Mr. Justice Vivian Bose and Mr. Justice B. Jagannadhadas.

ANDERSON WRIGHT LTD.

v.

MORAN AND COMPANY*

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November, 1.

Party signing as broker, passing to the buyer Brought Notes containing all the terms (including agreement for arbitration) of the contract—Allegation by buyer of breach of contract—Denial of liability by party signing as broker—Suit by it for declaration that it was not a party to the contracts and not liable under the same—Application for stay of suit under Section 34 of the Indian Arbitration Act—Conditions on which stay may be granted—Section 34 of the Indian Arbitration Act and Section 4 of the English Arbitration Act of 1889—Incumbent duty of the Court to decide the existence of a binding arbitration agreement between the parties when invited to stay a suit under Section 34.

A party signing as broker, and passing to the buyer Brought Notes which contained all the terms (including agreement for arbitration) of the contract, denied its liability when claims were made by the buyer against it for alleged breaches of contract Thereafter it filed a suit praying, *inter alia,* for declaration that it was not a party to the contracts and it had no liability under the same as it had acted merely as a broker. The defendant made an application under Sec. 34 of the Indian Arbitration Act for stay of the suit in order that the matters in dispute between the parties may be dealt with under the arbitration clause contained in the contracts. A stay was granted as, in the opinion of the Judge, the dispute was whether the plaintiff who admittedly passed the Brought Notes to the defendant, could be made liable under the contracts and the dispute, arising as it did, out of or concerning or relating to the contracts would come within the purview of the arbitration clause. On appeal against this decision, the Court of Appeal vacated the order of stay on the ground that the matter in dispute between the parties to the suit does not come within the ambit of the ar-

* Civil Appeal No. 205 of 1953 against the Judgment and Order dated the 24th February, 1953 of the High Court of Judicature at Calcutta in Appeal from Oriignal Order No. 19 of 1952 arising out of the Order dated the 23rd August, 1951 of the High Court of Calcutta in its Ordinary Original Civil Jurisdiction in Matter No. 157 of 1951.

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bitration Clause. Against the decision of the Court of Appeal, on the strength of a certificate under Article 133(1) (a) of the Constitution an appeal was preferred before the Supreme Court of India.

Held:—That in order that a stay may be granted under Section 34 of the Indian Arbitration Act it is necessary that the following conditions should be fulfilled :—

(1) The proceedings must have been commenced by a party to an arbitration agreement against any other party to the agreement :

(2) the legal proceedings which is sought to be stayed must be in respect of a matter agreed to be referred :

(3) the applicant for stay must be a party to the legal proceedings and he must have taken no steps in the proceeding after appearance. It is also necessary that he should satisfy the Court not only that he is but also was at the commencement of the proceedings ready and willing to do everything necessary for the proper conduct of the arbitration; and

(4) the court must be satisfied that there is no sufficient reason why the matter should not be referred to an arbitration in accordance with the arbitration agreement.

The first and essential pre-requisite to making an order of stay under Section 34 of the Arbitration Act is that there is a binding arbitration agreement between the parties to the suit which is sought to be stayed. The question whether the dispute in the suit falls within the arbitration clause really pre-supposes that there is such agreement and involves consideration of two matters, viz., (1) what is the dispute in the suit and (2) what disputes the arbitration clause covers? The question whether the plaintiff was a party to the agreement at all is undoubtedly one which cannot go before the arbitrators and with that question they cannot possibly deal. But, as Lord Porter pointed out in *Heyman* v. *Darwins* (1), "this does not mean that in every instance in which it is claimed that the arbitrator has no jurisdiction the court will refuse to stay an action. If this were the case such a claim would always defeat an agreement to submit disputes to arbitration, at any rate until the question of jurisdiction had been decided. The court to which an application for stay is made is put into possession of facts and arguments and must in such a case make up its mind whether the arbitrator has jurisdiction or not as best it can on the evidence before it. Indeed the application for stay gives an opportunity for putting these and other considerations before the court it may determine whether the action shall be stayed or not". Section 34 of the Indian Arbitration Act as is well known is a virtual reproduction of Section 4 of the English Arbitration Act of 1889.

(1) [1942] A.C. 356 (360).

It is incumbent upon the Court when invited to stay a suit under Section 34 of the Indian Arbitration Act to decide first of all whether there is a binding agreement for arbitration between the parties to the suit.

The matter will go back to the appellate bench of the Calcutta High Court which will decide as an issue in the proceedings under Section 34 of the Indian Arbitration Act the question whether the respondent was or was not a party to the arbitration agreement.

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November, 1.

Appeal by the Defendant to Supreme Court of India.

Application under Section 34 of the Arbitration Act.

K. P. Khaitan, Senior Advocate, with S. N. Mukherjee and Rajindra Narain, Advocates for the Appellant.

M. C. Setalvad, Attorney General for India and *A. N. Sen, Senior Advocate, with V. S. Sawhney and S. P. Varma, Advocates* for the Respondent.

The Judgment of the Court was as follows:—

B. K. Mukherjea, J. :—This appeal is directed against a judgment of an appellate bench of the Calcutta High Court, dated the 24th February 1953, reversing, on appeal, the judgment and order of a single Judge sitting on the Original Side of that Court, passed on an application under section 34 of the Arbitration Act. The material facts are not in controversy and may be shortly stated as follows:

On the 7th of July 1950 the respondent Moran and Company Limited passed two Bought Notes to the appellant company, couched in identical terms, under which the appellant purchased 12,00,000 yards of hessian cloth, 6,00,000 yards under each contract on certain terms and conditions stated therein. The delivery was to be made every month from January 1951 at the rate of 1,00,000 yards per month under each of these notes and payments were to be made in cash on delivery, each delivery being treated as a separate and distinct contract. The Bought Notes commenced thus:

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"Dear Sirs,

We have this day bought by your order and on your account from our Principals".

The particulars of the goods, the price, the time of delivery and other terms of the contract are then set out and amongst the terms is an arbitration clause worded as follows:

> "All matters, questions, disputes, differences and/or claims arising out of and/or concerning and/or in connection with and/or in consequence of or relating to this Contract, whether or not the obligations of either or both parties under this contract be subsisting at the time of such dispute and whether or not this contract has been terminated or purported to be terminated or completed, shall be referred to the arbitration of the Bengal Chamber of Commerce under the rules of its Tribunal of Arbitration for the time being in force and according to such rules the arbitration shall be conducted."

The notes were signed by the respondent Moran and Company describing themselves as brokers.

It is admitted that the goods covered by the Bought Notes were delivered to the appellant in all the months from January to June 1951 with the exception of the goods due to be delivered for the month of March 1951. The appellant required from the respondent delivery of goods in respect of the month of March but the latter informed the appellant, by a letter dated the 27th March, 1951 that its principals disowned any liability in this respect as there was default on the part of the appellant in not giving shipping instructions for the said goods within the time mentioned in the contracts. The appellant denied any default on its part and did not also accept the position that the respondent had any principal, and on the 27th of April, 1951 it sent its bills to the respondent claiming Rs. 1,13,042-3-0 as damages for non-delivery of the goods. As the respondent did not comply with this demand, the appellant contemplated referring the matter in dispute to

the arbitration of the Bengal Chamber of Commerce as provided in the contracts and while it was preparing to take steps in that direction, the respondent, on the 11th of June 1951, filed a suit against the appellant in the Original Side of the Calcutta High Court (being Suit No. 2516 of 1951) and it is in respect of this suit that the application under section 34 of the Arbitration Act has been made. It was alleged in the plaint that the plaintiff acted merely as broker and in that capacity brought about the two contracts of sale and purchase evidenced by the two Bought Notes mentioned above, that the real seller was a firm known as Gowarchand Danchand, and that the plaintiff not being a party to the contract could not incur any liability under its terms. There were prayers in the plaint for a declaration that the plaintiff was not a party to the said contracts and that it had no liability under the same. There was a further prayer for an injunction restraining the respondent from claiming any damages in respect of the said contracts.

The writ of summons was served on the appellant on the 23rd of June 1951. On the 19th July 1951, it filed an application under section 34 of the Indian Arbitration Act praying that the proceedings in the suit may be stayed in order that the matter in dispute between the parties may be dealt with under the arbitration clause contained in the contracts. The application was heard by Das Gupta, J. who allowed the prayer of the applicant and stayed further proceedings in the suit. In the opinion of the learned Judge the dispute in this case was not whether there was any contract entered into by and between the appellant and the respondent, but whether the respondent, who admittedly passed the two Bought Notes to the appellant, could be made liable under the contract by reason of the fact that it described itself as broker. The answer to this question depended according to the learned Judge upon the interpretation of the contract itself and the dispute arising as it did out of or concerning or relating to the contracts would come within the purview of the arbitration clause.

Against this judgment the respondent took an appeal to the Appellate Division of the High Court and the appeal was heard by a bench consisting of Chakravarti, C. J. and Sarkar, J. By two separate judgments which concurred in the result, the

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Chief Justice and the other learned Judge allowed the appeal and vacated the order for stay. It is against this judgment that the appellant has come to this court on the strength of a certificate under Article 133(1)(a) of the Constitution. The short point for our consideration is, whether on the facts of this case the appellant is entitled to an order under section 34 of the Indian Arbitration Act, staying the proceedings of the suit commenced by the respondent.

Section 34 of the Indian Arbitration Act is in these terms:

"Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings".

Thus in order that a stay may be granted under this section, it is necessary that the following conditions should be fulfilled:—

(1) The proceeding must have been commenced by a party to an arbitration agreement against any other party to the agreement;

(2) the legal proceeding which is sought to be stayed must be in respect of a matter agreed to be referred;

(3) the applicant for stay must be a party to the legal proceeding and he must have taken no step in the proceeding after appearance. It is also necessary

that he should satisfy the court not only that he is but also was at the commencement of the proceedings ready and willing to do every thing necessary for the proper conduct of the arbitration; and

(4) the court must be satisfied that there is no sufficient reason why the matter should not be referred to an arbitration in accordance with the arbitration agreement.

The third condition can be taken to have been fulfilled on the facts of the present case, and the fourth is one which is exclusively for the determination of the court. The controversy between the parties centres round the other two conditions, namely, conditions (1) and (2); and unless the applicant for stay succeeds in establishing that the respondent is a party to an arbitration agreement and that the subject matter of dispute in the suit is a matter coming within the scope of such agreement, it cannot possibly ask the court to order a stay of the proceedings, under section 34 of the Arbitration Act. The learned Judges of the appellate bench of the High Court have taken the view that the only matter in dispute between the parties to the suit is whether the plaintiff was a party to the contract. It was definitely alleged by the plaintiff that the contract was not between it and the appellant but was one between the appellant and a third party and since the arbitration agreement is contained in the contract, it is an agreement between those parties only, which could not bind or affect the plaintiff in any way. The dispute, it is said, which is the subject matter of the suit does not arise under the contract and does not relate to it; it is outside the contract altogether and does not come within the scope of the arbitration agreement. The decision in the appeal therefore rests entirely on the finding of the learned Judges that the matter in dispute between the parties to the suit does not come within the ambit of the arbitration clause. In view of this decision the learned Judges did not consider it necessary to go into the first point as to whether in fact there was a binding arbitration agreement between the parties to the suit. The learned Chief Justice no doubt did in a manner consider that point also, but he refrained from

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pronouncing any decision upon it, being of opinion that a decision on this question which was the only issue in the suit itself might prejudice the parties and create a bar of *res judicata* against one or the other.

We think that on the facts of this case it was necessary for the learned Judges of the appellate bench to decide the question as to whether or not the plaintiff in the suit which the applicant wants to stay was a party to the arbitration agreement. This would have a material bearing on the decision of the other question upon which the learned Judges rested their judgments.

The first and essential pre-requisite to making an order of stay under section 34 of the Arbitration Act is that there is a binding arbitration agreement between the parties to the suit which is sought to be stayed. The question whether the dispute in the suit falls within the arbitration clause really presupposes that there is such agreement and involves consideration of two matters, viz., (1) what is the dispute in the suit and (2) what disputes the arbitration clause covers? *Vide* per Viscount Simon in *Heyman* -v- *Darwins* (1). The contention raised by the plaintiff in the present suit is, that the contract was really between the appellant and another party and not between it and the appellant and consequently it was not bound by the contract and could not be made liable for any damages in terms thereof. In substance therefore the controversy between the parties in the suit is whether the plaintiff did incur any liability in terms of the contracts evidenced by the two Bought Notes to which it was a signatory no matter in whatever capacity. The question whether the plaintiff was a party to the agreement at all is undoubtedly one which cannot go before the arbitrators and with that question they cannot possibly deal. But as Lord Porter pointed out in *Heyman* v. *Darwins* (1), at page 393 "this does not mean that in every instance in which it is claimed that the arbitrator has no jurisdiction the court will refuse to stay an action. If this were the case such a claim would always defeat an agreement to submit disputes to arbitration, at any rate until the question of jurisdiction had been decided. The court to which an application for stay is made is put in

(1) [1942] A.C. 356 at 360—393.

possession of the facts and arguments and must in such a case make up its mind whether the arbitrator has jurisdiction or not as best it can on the evidence before it. Indeed, the application for stay gives an opportunity for putting these and other considerations before the court that it may determine whether the action shall be stayed or not". Section 34 of the Indian Arbitration Act as is well known is a virtual reproduction of section 4 of the English Arbitration Act of 1889. The observations quoted above were approved of by Mr. Justice S. R. Das in the case of *Khusiram* v. *Hanutmal* (1) and it was held by the learned Judge that where on an application made under section 34 of the Indian Arbitration Act for stay of a suit, an issue is raised as to the formation, existence or validity of the contract containing the arbitration clause, the court is not bound to refuse a stay but may in its discretion, on the application for stay, decide the issue as to existence or validity of the arbitration agreement even though it may involve incidentally a decision as to the validity or existence of the parent contract.

We are in entire agreement with the view enunciated above. As we have said already, it is incumbent upon the court when invited to stay a suit under section 34 of the Indian Arbitration Act to decide first of all whether there is a binding agreement for arbitration between the parties to the suit. So far as the present case is concerned if it is held that the arbitration agreement and the contract containing it were between the parties to the suit, the dispute in the present suit would be one relating to the rights and liabilities of the parties on the basis of the contract itself and would come within the purview of the arbitration clause worded as it is in the widest of terms, in accordance with the principle enunciated by this court in *A. M. Mair and Company* v. *Gordhandas* (2). If on the other hand it is held that the plaintiff was not a party to the agreement, the application for stay must necessarily be dismissed.

The appellate Judges of the High Court in our opinion held rightly that the decision in *A. M. Mair and Company* v.

(1) (1948) 53 C.W.N. 505 at 518.
(2) [1950] S.C.R. 792.

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Gordhandas (1) was not in any sense conclusive in the present case on the question of the dispute in the suit being included in the arbitration agreement. The report shows that the dispute in that case was whether the appellants had made the contract in their own right as principals or on behalf of the Bengal Jute Mill Company as agents of the latter. The decision of this question was held to turn upon a true construction of the contract and consequently it was a dispute under or arising out of or concerning the contract. The judgment proceeds on the footing that there was in fact a contract between the parties and the only dispute was in which character they were parties to it, the respondents contending that the appellants were not bound as principals while the latter said that they were. Mr. Justice Fazl Ali in delivering the judgment pointed out that the error into which the learned Judges of the appellate bench of the High Court appeared to have fallen was their regarding the dispute raised by the respondent in respect of the position of the appellants under the contract as having the same consequence as a dispute as to the contract never having been entered into.

In this case it is certainly not admitted that the respondent was a party to the contract. In fact that is the subject-matter of controversy in the suit itself. But as has been said already, the question having been raised in this application under section 34 of the Indian Arbitration Act, the court has undoubted jurisdiction to decide it for the purpose of finding as to whether or not there is a binding arbitration agreement between the parties to the suit. It has been said by Chakravartti, C.J., and in our opinion rightly, that if the person whose concern with the agreement is in question is a signatory to the contract and formally a contracting party, that will be sufficient to enable the court to hold for purposes of section 34 that he is a party to the agreement. It was the contention of the respondent in the court below that this test was not fulfilled in the present case. The point has been canvassed before us also by Mr. Sen and it has been argued on the authority of several decided cases that in cases of this description the Bought Note is a mere intimation to the buyer, that the orders of the latter have been carried out and purchases have been made from other

(1) [1950] S.C.R. 792.

persons and not from them. The writer does not thereby become a party to the contract of purchase and sale even as an agent. He remains a mere broker or intermediary and the provision of section 230(2) of the Contract Act cannot be invoked against him. Mr. Khaitan on the other hand argues that the English law being quite different from the Indian law regarding the liability of an agent contracting on behalf of an undisclosed principal, the English authorities are no guide to a solution of the problem. It is said that the case of *Patiram* v. *Kanknarrah Company* (1), upon which the respondent relies, was wrongly decided being based upon English auhorities which have no application to India. The respondent here, it is pointed out, signed an elaborate document setting out in full every particular of the contract entered into and it is impossible to say that he was not an agent executing a contract on behalf of another whose identity he did not disclose but was a mere intermediary conveying an information to the buyer. In our opinion, the point is not free from doubt and requires careful consideration and as it was not decided by the learned Judges of the High Court and we have not the advantage of having their views upon it, the proper course for us to follow would be to send the case back for a hearing of and decision on this point. We therefore allow the appeal and set aside the judgments of both the courts below. The matter will go back to the appellate bench of the Calcutta High Court which will decide as an issue in the proceeding under section 34 of the Indian Arbitration Act the question whether the respondent was or was not a party to the arbitration agreement. If the court is of opinion that the respondent was in fact a party, the suit shall be stayed and the appellant would be allowed to proceed by way of arbitration in accordance with the arbitration clause. If on the other hand the finding is adverse to the appellant, the application will be dismissed. The appellant will have its costs of this appeal. Further costs between the parties will abide the result.

P.K.R.

Appeal allowed.
Case remanded.

(1) (1915) I.L.R. 42 Calc. 1050.

APPELLATE CRIMINAL.

Before Mr. Justice K. C. Das Gupta and
Mr. Justice P. C. Mallick.

CRIMINAL.

1955.

March, 31.

ARTHUR ALEXANDER WATSON.
v.
THE STATE *

Evidence of an accomplice, if can be accepted without corroboration—Conviction under Sec. 23 of the Foreign Exchange Regulation Act (Act VII of 1947)—Conviction without corroborative evidence, found to be bad.

Ordinarily it is unsafe to rely on the testimony of an accomplice unless it is corroborated in material particulars by independent evidence. There may no doubt be circumstances in which the Court may accept the statement of an accomplice without any corroboration.

It was found in the present case that no such special circumstances existed :

Held that it was impossible to apply in this case the exceptional rule of accepting the evidence of an accomplice without corroboration.

On consideration of the evidence on the record it was further found that there was practically nothing on the record to corroborate the evidence of the accomplice in the present case :

Held that in view of the above finding, the prosecution had failed to prove the case against the accused and that the order of conviction could not stand.

Appeal by the Accused.

Conviction under Section 23(1) of the Foreign Exchange Regulation Act. (Act VII of 1947) for contravention of an order passed under Section 8 of the Act by sending through one, a large quantity of gold to India without any permit. The accused was sentenced to rigorous imprisonment for one year and a fine of Rs. 50,000/-, in defaut of payment of this fine further rigorous imprisonment for six months.

The material facts will appear from the judgment.

* Criminal Appeal No. 258 of 1954.

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1955.

Arthur Alexander Watson
v.
The State

March, 11.

L. P. Mitter, Ajit K. Dutta, A. K. Sen and Bimal Ch. Chatterjee for the Accused Appellant.

G. P. Kar and Amiya K. Mukherjee for the State.

The judgment of the Court was as follows :—

K. C. Das Gupta, J. :—The appellant has been convicted under section 23(1) of the Foreign Exchange Regulation Act. (Act VII of 1947) for contravention of an order passed under section 8 of the Regulations by sending through one, Elckhoff, Second Engineer of the "Eastern Queen", a large quantity of gold to India without any permit and has been sentenced to rigorous imprisonment for one year and a fine of Rs. 50,000/-. It has been further directed that in default of payment of this fine, he would suffer rigorous imprisonment for six months.

The "Eastern Queen" sailed from Hongkong at 6-30 p.m. on the 29th April, 1954. It reached Calcutta Port on the 11th May, 1954. Shortly after this, the Customs authorities siezed 28 packets of gold, altogether weighing nearly 9000 tolas valued at over Rs. 8,00,000/-. from within the cabin of the Second Engineer of the ship, one Elckhoff. Elckhoff was tried later on a charge of having brought to Calcutta this gold in contravention of the provisions of the Foreign Exchange Regulation Act and he was convicted on his own plea of guilty and sentenced to a fine of Rs. 100/- and ordered to undergo imprisonment for three months in default. The present appellant was arrested at Dum Dum Air port on the 12th July, 1954. The case against him, as already indicated, is that he had sent the gold that was found in Elckhoff's cabin on the 11th of May from Hongkong to India through Elckhoff. The accused pleaded not guilty and denied any connection with the sending of the gold.

Direct evidence that the gold was sent by this appellant is given by Elckhoff himself. His evidence is that Watson approached him with a proposal that he should carry some gold on Watson's behalf to Calcutta in the beginning of

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April last and in spite of his repeated refusal persisted in his request and that finally on the 28th of April, 1954, he telephoned Watson at about 2 p.m. just to inform him that his refusal stood, but thereafter he saw Watson again at 6 p.m. and ultimately agreed to carry some 500 tolas of gold. His further evidence is that about 10 p.m. at night Watson accompanied by one Peter came to his cabin carrying between them all the gold that was later seized from his cabin, on their persons under the shirts they were wearing and made the gold over to him and gave detailed instructions.

The only question before the Court is whether this evidence should be believed. If this evidence is believed that would be sufficient to justify the conviction of the accused. We have to remember, however, in considering the question whether the evidence should be believed, that ordinarily it is unsafe to rely on the testimony of an accomplice unless it is corroborated in material particulars by independent evidence. There may, no doubt, be circumstances in which the court may accept the statement of an accomplice without any corroboration. In my opinion, there is no such circumstance here. It has to be mentioned in this connection that the evidence indicates that after the gold was seized in Calcutta Port on the 11th May, 1954, Elckhoff was interrogated from day to day and, as may well be imagined, considerable pressure was put on him to disclose the source from which he had received the gold; but he remained adamant and persisted in denying any knowledge of how the gold came to be there. It is also important to remember that though according to Elckhoff the names of certain persons had been supplied to him as the consignees of these bars of gold, he was unable to mention their names in Court. He said that the consignees were three in number but he could not give their names. In reply to a question by the Court he said : "I do not know them and their names". It further appears from his evidence that the pieces of paper on which the addresses of these persons had been written were thrown by him into the Hooghly. His conduct, in persisting in denying any knowledge of how the gold came to be there and in refusing to disclose the names of the consignees to the Court even at the trial and in throwing the papers containing the addresses into the

river marks him out to be a man of considerable care and determination and not an unsophisticated, simple fellow. In the circumstances in which the gold was carried in his cabin, it is in my judgment, impossible to apply to this case the exceptional rule of accepting the evidence of an accomplice without corroboration.

Mr. Kar drew our attention to the fact that at the time Elckhoff gave his evidence in court he had already been convicted and received his punishment so that the consideration that he would give false evidence in expectation of getting a lenient treatment for the authorities was not applicable. It has to be remembered, however, that before his previous trial he had made the statement mentioning the present accused as the person who had given him the gold. At the time that statement was made he was undoubtedly in grave risk himself. The fact that later in Court he had made a statement substantially to the same effect does not make him a more trustworthy witness than he was on that date.

It is necessary, therefore, to turn to the other evidence on the record to find out whether there is such corroboration in material particulars that it will be safe to accept his testimony as true. I am unable to discover such evidence on the record. Practically, the only evidence, worth mentioning, is the oral testimony of two persons, Bradley and Parish, that on the night before the ship left Hongkong, Watson accompanied by another person came on board the "Eastern Queen". Parish is the Third Officer of the "Eastern Queen". He ought to know exactly the date on which the ship left. It is curious therefore to see that while at the trial of this case he said that he saw Watson on board the ship "the night before the ship started for Singapore", which would mean the night of the 28th April, he made a statement on oath at the previous trial of Elckhoff in these words :

"The ship "S. S. Eastern Queen" left Hongkong on the 29th April, 1954. That day at about 11-30 p.m. I had seen accused Elckhoff in the company of two men, one of them was man named Alex. Watson. This was on the ship".

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Even if this inconsistency be considered immaterial, it is important to note that in his evidence in this case Parish does not mention the time of the night when Watson and his companion came on board the ship. No less important is the fact that Parish while claiming to know Watson from before has said that he knew Watson for the first time on the 24th April, 1954. He does not disclose in what connection he came to know him nor for how long he did see him. It is important to remember that the ability of the two witnesses to identify Watson was not tested by putting them on a test indentification parade. It was therefore important for the Court to ascertain from the evidence that the witnesses knew the man well enough from before so as to make no mistake about the identity. In respect of this witness Parish, I am unable to see anything on the record to satisfy the court that he knew Watson well. He does not claim to have seen Watson in any other connection except that on one occasion on the 24th April, at the Peninsular Hotel at Hongkong in connection with which he has not disclosed any details. It is important to notice also that he does not claim to have seen him for a long time, nor does it appear whether the place of the ship where he found them was well-lighted or not. In my judgment, it is not possible to rely on vague, indefinite evidence of this nature to decide an important fact whether or not Watson visited the ship at about 10 p.m. as mentioned by Elckhoff on the night of the 28th April.

The other witness, Bradley, is the Fourth Officer of the "Eastern Queen". His evidence is that when he was on duty at 10 p.m. on the 28th April, 1954, on the "Eastern Queen", he saw Watson accompanied by another person on the ship outside the Second Engineer's cabin and was told by them that "they were after Mr. Elckhoff". He says further that asked by them whether Elckhoff was on board, he replied in the affirmative and offered to rouse him and actually did rouse Elckhoff by knocking at the door for a few minutes and that Watson and the other man were outside the cabin when this knocking was going on; that Elckhoff came to the door from inside the cabin and asked Watson and the other man to wait a few minutes till he got some clothes; that after this, these three, namely Watson, his companion and the

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witness went to the mess table on the deck and sat there for 2 or 3 minutes after which Elckhoff came out and accosted Watson and his companion.

If this witness is to be believed, he had good opportunity of seeing the two men who came to Elckhoff's cabin that night. It is interesting to notice however, that he has not disclosed for how long he has known Watson. He has said in his evidence: "I know accused Watson"—that does not mean that he knew him from before, the 28th April, 1954. In cross-examination he said: "I did not remember what he looked like. But.....him at the security Control I thought Watson was like him". This itself indicates that he was not sure about the features of the man and could not have known him from before the 28th April, 1954.

In assessing his evidence, one has to remember that according to Elckhoff's evidence Watson and his companion carried between them a quantity of gold which was about 2 maunds 33 seers in weight. Each of them would therefore have been carrying about a maund and sixteen seers of gold. That would be good enough weight to tire most people. If Bradley did see these two men at the time, as he says, he did, both of them must have been carrying the gold at that time for there is no suggestion that the gold was brought in later on or earlier Elckhoff's evidence being that after he opened the door to these men they took off their shirts and underneath the shirts were the jackets in which the gold was being carried. One would have therefore expected Bradley to notice, in the movements of these two men in going about the ship to Elkhoff's cabin, back to the mess table and sit ting there, something peculiar. Bradley does not claim to have seen anything which aroused his suspicion.

What appears to me even more strange is that it would be necessary to rouse Elckhoff in the manner in which it is alleged he has roused. If there was an arrangement between Elckhoff and Watson that gold would be brought to Elckhoff later at night, it is reasonable to expect that the time and the manner would be agreed upon in detail and Watson would take care to insist that Elckhoff would be ready to re-

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ceive him of his burden as soon as possible. Instead of that, we find from the evidence that Elckhoff was apparently fast asleep! that an initial attempt by Watson and his companion to rouse him had failed; that even after Bradley volunteered to rouse him, he had to knock at the door "a few minutes" before Elckhoff was roused; and that after he did get up, he required to get some clothes before he was in a position to receive his visitors. That is not at all the conduct of a man who had arranged to receive gold, worth a considerable amount of money, for smuggling.

For these reasons, I find it impossible after taking into consideration the fact that the learned Magistrate had the opportunity of seeing these witnesses to believe the evidence of either of these witnesses, Parish and Bradley, and find it impossible to escape the conclusion that they have given evidence as the result of pressure being put on them by other people.

Apart from this oral testimony, there is practically nothing on the record to corroborate the evidence of Elckhoff. I must admit that I am surprised to see that evidence has been put in in this case of some letter heads of Alexander Watson and Co., a visiting card of the name of Alexandar Watson, one document apparently to show that Watson had purchased a car valued at £1,000/- a pass port, some photographs, a marriage certificate and sundry documents. How these can corroborate Elckhoff's evidence, I have failed to discover. Mention must be made also of an entry in a diary which was seized on the 23rd of May, from Eickhoff on the last page of which there is an entry, 54018, Alexandar Watson. That this is the number of the accused's telephone is shown by the letter heads mentioned earlier. All that this entry shows is that Elckhoff had some reason to keep a record of Watson's telephone number and did make such a note. This, in my opinion, does not corroborate even the fact that any telephone message was sent by Elckhoff to Watson, far from corroborating any further statements made by Elckhoff.

Another circumstance on which reliance appears to be

placed as corroborative evidence is the fact that Elckhoff knew the telegraphic address of Alexandar Watson, as he spoke about the same in his evidence. Obviously, before he came into the witness box, Elckhoff had sufficient opportunity to see the letter heads of Alexandar Watson and Co. His knowledge therefore of the telegraphic address is of no consequence. Assuming that he knew Watson's telegraphic address, and also the Chatham road address of Watson's fiancee, before he reached Calcutta, that would only show that he knew Watson intimately before the 28th April, 1954; but would not by any means corroborate the story of Watson giving the gold to him.

The learned Magistrate appears to have been impressed by the fact that the accused became "suddenly rich contemporaneously with the time when he had been to Macau and the gold was smuggled into India". The only basis of this theory of sudden accumulation of wealth appears to be the travels by the accused with his wife and the purchase of a car. It does not appear to me that these travels and the purchase of a car can be said to indicate sudden accumulation of wealth. Even assuming that there was reason to think that at about the time when this gold was seized in Calcutta, this appellant also came into wealth, I am unable to see any justification for assuming a casual connection between the two.

I have, therefore, come to the conclusion that there is, in this case, no reliable corroboration of Elckhoff's evidence in court that the gold that was found in his cabin was brought there by the accused Watson and in the absence of such corroboration it is not possible to rely on his testimony.

My conclusion, therefore, is that the prosecution has failed to prove the case against the accused and that the order of his conviction cannot stand.

I would, therefore, allow the appeal, set-aside the order of conviction and sentence and order that the accused be acquitted. He is discharged from his bail bond.

The direction which was issued under orders of this Court to the Air-Lines, Steamship Companies and Indian

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Railways having their offices in Calcutta not to book any air or other passage for the appellant until further orders of this Court is also withdrawn. The Security Police is directed to inform the Air-Lines Steamship Companies and Indian Railways concerned of this order of withdrawal.

P. C. Mallick, J. :—I agree.

R.M.

Appeal allowed.

APPELLATE CIVIL.

Before Mr. Justice K. C. Das Gupta and Mr. Justice B. K. Guha.

CIVIL.

1954.

December, 7.

SM. DURGESH NANDINI DEBI.

v.

AOLAD SHAIKH alias AOLAD KHAN*

Amalnama, not registered, if receivable in evidence—Whether presumption of tenancy from month to month can be drawn from possession and payment of rent in the absence of oral agreement.

An amalnama, which was sought to be put in evidence by the defendant in support of his plea of tenancy right under the plaintiff, is not receivable in evidence, as the amalnama is not a registered document Although there was in fact no oral agreement for a lease not for a term exceeding one year or not reserving a yearly rent, yet, from the facts that the defendant was in possession with the permission of the plaintiff and paid rent to the plaintiff, a tenancy could fairly be presumed in favour of the defendant. There being no valid contract to the contrary within the meaning of section 106 of the Transfer of Pro-

*Appeal from Appellate Decree No. 801/1948 against the decree of Sri J. M. Bir, Subordinate Judge, 1st. Additional Court, District Burdwan, in Title Appeal No 103/47 dated the 9th April, 1948, modifying the decree of Sri S. K. Neyogi, Munsif, 2nd. Court, Katwa, dated the 31st of March, 1947.

perty Act, the lease, although the intention of the parties clearly was to create a permanent lease, shall be deemed to be a lease from month to month terminable by fifteen days' notice expiring with the end of a month of the tenancy.

Rām Kumar Das v. *Jagadish Chandra Deo, Dhablal Deb* (1) relied on.

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Sm. Durgesh Nandini Debi v. Aolad Shaikh (alias) Aolad Khan.

Appeal by the Plaintiff.

Suit for declaration of title and for Khas Possession.

The material facts will appear from the Judgment :—

A. C. Mukherjee and Chandra Nath Mukherjee for the Appellant.

Purushottam Chatterjee for the Respondent.

The judgment of the Court was as follows :—

K. C. Das Gupta, J. :—The subject matter of this litigation is a small plot of land forming part of the bank of a tank known as 'Dalan Pukur'. Originally, it formed part of a patni, the owner of the patni being one Ananda Prosad Chowdhury. The patni was sold on the 16th May, 1936 under Regulation VIII and purchased by Bithaldas Kuthari. The plaintiff's case is that Bithaldas settled the property with Ahibhusan Ghosh on the 20th March, 1940 and thereafter the plaintiff purchased this particular land on the 15th February, 1944 by a registered Kabala. It is alleged that he was dispossessed by the defendant on the 9th February, 1945.

December, 7.

The defence is one of a right of tenancy which it is said has not been determined. The defendant contends that one Hatu Shaikh took permanent settlement of some lands including the land in dispute in April, 1934, and that Hatu Shaikh who exercised possession thereafter and regularly paid rent sold half of the land covered by the jama to the present defendant on the 26th March, 1942. It is said that some time after that on partition between Hatu Shaikh and the defendant the present plot fell in the defendant's

(1) [1952] S.C.A. 79.

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share and the defendant has since then been in possession thereof. The defendant also denied that the plaintiff had acquired any title by purchase.

The trial court held that the plaintiff had the title to the land as mentioned and disbelieved the defendant's story of any tenancy right in favour of Hatu Shaikh. It further held that even if there was any such tenancy, Hatu was merely a tenant at will and the tenancy determined as soon as Hatu assigned his interest. It accordingly held that the plaintiff was entitled to a decree for declaration of title and for Khas possession and ordered accordingly. In appeal, the learned Subordinate Judge agreed with the trial court that the plaintiff's title had been proved. Disagreeing with the trial court as regards the genuineness of certain rent receipts which the defendant had put in evidence in support of his case of tenancy, the learned Subordinate Judge held that they were genuine and from those a tenancy could reasonably be inferred. As regards the period of the tenancy he held that in law it should be considered to be a tenancy from month to month so that without determination by proper notice to quit the prayer for eviction could not succeed. Accordingly, he allowed the appeal while maintaining the decree in so far as it declared the plaintiff's title to the suit land and rejected the plaintiff's prayer for Khas possession and ordered that the "plaintiff should get possession in the suit land through defendant as a monthly tenant under the plaintiff in respect of the same". The present appeal is by the plaintiff.

The main contention on behalf of the plaintiff is that the learned Court below has erred in law in holding that there was a tenancy and secondly that even if there was a tenancy, it should have held that it was merely a tenancy which the parties intended was determinable at the will of either party and that it had been so determined.

Mention may be made of an amalnama which was sought to be put in evidence but was rightly rejected by both the courts as it was not registered.

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On behalf of the respondent, Mr. Chatterji has however asked us to hold that this must be considered to be a lease of immovable property other than a lease from year to year or for a term exceeding one year or reserving a yearly rent and has been made by oral agreement. At first sight, it is difficult to accept the argument, as obviously in fact there was no oral agreement for a lease which was not for a term exceeding one year or which did not reserve a yearly rent. Reliance has however been placed on the Supreme Court decision in *Ram Kumar Das* -v- *Jagadish Chandra Deo Dhablal Deb* (1), where their Lordships held that in the absence of a valid lease a tenancy could be presumed to exist even though the parties might have intended to create a lease for ten years. In *Ram Kumar Das's Case* (1), Mukherjea, J. says. "Proceeding, therefore, on the assumption that even though the parties might have intended to create a lease for ten years, no operative lease came into existence, the only facts admitted are that the defendant remained in possession of the land belonging to the plaintiff with the permission of the Receiver who represented the plaintiff's estate and paid rent to the latter. From these facts a tenancy could be fairly presumed and the point for determination is, what was the duration of the tenancy that was created in the present case". We are bound by this authority to hold that in the present case even though there is clear indication that what the parties intended to create was a permanent lease and no operative lease came into existence, on the fact found by the appellate court that the defendant remained in possession of the land belonging to the plaintiff clearly with the permission of the plaintiff's predecessor-in-interest and paid rent to them, a tenancy has to be presumed.

It is necessary to mention in this connection an argument raised on behalf of the appellant that finding of the Court below as regards payment of rent should be discarded inasmuch as its judgment on this was not a "proper judgment of reversal". Special stress is laid on the fact that the Appellate Court did not take into consideration the criticism by the trial court of Ex. B(1) that though it purports to show a payment of rent in 1345 B.S. the

(1) [1952] S.C.A. 79 (88).

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year 1948 B.S. is mentioned at the top of the document. It is necessary to remember however that Bonbehari Hazra, who claims to be an officer of Ananda Prosad Saha Chowdhury and thereafter of Bithaldas, has given evidence as regards realisation of rent against this rent receipt and has spoken definitely that he issued this receipt, was not asked a single question about this. It is hardly fair to disbelieve a witness on a circumstance like this, without giving the witness an opportunity to explain it. One explanation which appears to me not to be improbable is that having issued receipt No. 7 from the book before this he had in this mind the figure 8 when he started writing out this document and just as he put the number 8 in giving the number of the dakhila he also put number 8 after the printed figures '134'.

On consideration of the whole matter, I am not prepared to agree that much weight can be attached to this apparent anomaly in the document. It is well to remember that the learned judge has taken into consideration such outstanding facts as the bringing of a suit by Bithaldas for rent against the present defendant and has given other reasons for his decision. It is not for us to consider here whether we should accept those reasons as justifying his conclusion. His finding on this question of fact namely whether rents were paid by the present defendant to Bithaldas and Ahibhusan is binding on us. I do not think that we should be justified in discarding the finding because of what the learned Advocate for the appellant says of its not being "a proper judgment of reversal".

Once it is found, as in my judgment we are bound to find, on the authority of the Supreme Court decision mentioned above, that a tenancy should be presumed in favour of the defendant under Ahibhusan and his predecessors, the only question that remains is as regards the duration of the tenancy. On this, the defendant relies on the provisions of section 106 of the Transfer of Property Act under which "in the absence of a contract or local law or usage to the contrary, a lease of immovable property for residential purpose, shall be deemed to be a lease from month to month, terminable, on

(1) (1952) S.C.A. 79-88.

the part of either lessor or lessee, by fifteen day's notice expiring with the end of a month of tenancy". Against the argument that the intention of the parties clearly being that the lease should be permanent and not one from month to month there is no scope for operation of section 106 of the Transfer of Property Act that the lease should be deemed to be one from month to month, it is contended however that the words of the statute should be construed very strictly and as soon as there is no valid contract to the contrary, the lease in such a case shall be deemed to be a lease from month to month. In my judgment, this contention should prevail and that though the intention of the parties was to create a permanent lease, there being no valid contract for the same, the tenancy in this case should be deemed to be from month to month, terminable on the part of either lessor or lessee, by fifteen day's notice expiring with the end of a month of the tenancy. Admittedly, no such notice has been given. My conclusion, therefore, is that the learned judge is right in rejecting the plaintiff's prayer for eviction of the defendant.

A further point was raised on behalf of the respondent by Mr. Chatterji that if a tenancy is found, section 9(1) (b) of the Bengal Non Agricultural Tenancy Act puts another obstacle in the way of the plaintiff's success. In view of the conclusion I have already reached as mentioned above, it is not necessary to consider this further submission.

I would accordingly dismiss this appeal with costs.

B. K. Guha, J.—I agree.

Appeal dismissed.

P.K.D.

APPELLATE CIVIL.

Before Mr. Justice K. C. Das Gupta and
Mr. Justice B. K. Guha.

CIVIL.

1955.

January, 19.

RAMPROSAD SINGH

v.

SONATAN GHOSH BAJAL.*

Ejectment Suit, when disposed of by the trial court a decree affirmed in appeal prior to but a second appeal pending on the dates when the Calcutta Thika Tenancy Act, 1949, Calcutta Thika Tenancy (Amendment) Ordinance, 1952 and Calcutta Thika Tenancy Act, 1953 came into force—Whether the Provisions of the Calcutta Thika Tenancy Act, 1949 as amended by the Calcutta Thika Tenancy (Amendment) Ordinance, 1952 will apply.

An ejectment suit constituted on 20th November 1945 and was decreed by the trial court on 14th June 1947. The decree was affirmed on appeal on 27th March 1948. A second appeal was presented to the High Court on 12th July 1948 and was pending on the dates when the Calcutta Thika Tenancy Act, 1949, Calcutta Thika Tenancy (Amendment) Ordinance, 1952, and the Calcutta Thika Tenancy Act, 1953, came into force:

Held that as no decree had been passed between the commencement of the Calcutta Thika Tenancy Act, 1949 and the Calcutta Thika Tenancy (Amendment) Ordinance, 1952, the Provisions of Sub-section (2) of Section 5 of the Ordinance have no application. *Held* further that the provisions of the Calcutta Thika Tenancy Act of 1949 as amended by the Calcutta Thika Tenancy (Amendment) Ordinance, 1952, shall apply to the case

Mahadeb Ram Kahar v. *Tinkari Roy* (1) followed.

Appeal by the tenant Defendant.

Suit for ejectment and recovery of arrears of rent and profits.

The material facts will appear from the judgment.

* Appeal from appellate decree No 829 of 1948 against the decree of Sri N Banerjee, Addl. Subordinate Judge, 3rd Court Zilla 24-Parganas, dated the 27th March, 1948, affirming the decree of Sri K N. Chakravarty, Munsiff, 1st Court Alipur, dated the 14th June, 1947.

(1) (1954) 58 C.W.N. 651.

Chandra Sekhar Bhowmick and Abani Kanta Roy for the Appellant.

A. C. Mukherjee and Satya Prosad Banerjee, for the Respondent.

The judgment of the court was as follows :—

K. C. Das Gupta, J. : This appeal is by the defendant in a suit for ejectemnt and recovery of arrears of rent and mesne profiits, on the allegation that the defendant's tenancy had been determined by notice to quit. The defence was two-fold; first, that there was no valid notice and secondly that the rent was Rs. 7/8/- instead of Rs. 8/2/- as claimed by the Plaintiff.

The Courts below have rejected the defence contentions and found that the notice was valid and sufficient and there was determination of the tenancy in accordance with law. They have also given a decree at the rate of Rs. 8/2/- as claimed by the Plaintiff for arrears of rent and also at the same rate for mesne profits.

The suit was instituted on the 20th November 1945 and was decreed by the trial Court on the 14th June 1947. This was affirmed on appeal on the 27th March 1948. The second appeal to this Court was presented to this Court on the 12th July 1948 and was pending on the date the Calcutta Thika Tenancy Ordinance, 1948, came into force and was pending in this Court on the 28th February 1949 when the Calcutta Thika Tenancy Act, 1949, came into force, on the 21st October, 1952, when the Calcutta Thika Tenancy (Amendment) Ordinance, 1952, came into force and again in 1953 when the Calcutta Thika Tenancy Act, 1953, came into force.

It was contended before us on behalf of the appellant that the learned Court below was wrong in thinking that the notice was valid and sufficient. It appears to me that this finding, based as it is, on the finding of fact that the tenancy was according to the Bengalee Calendar month is a finding with which we cannot interfere.

CIVIL.

1955.

Ramprosad Singh v. Sonatan Ghosh Bajal

K. C. Das Gupta, J.

The only fact that remains for consideration is the question that appears to have been raised on he 26th November 1952 that the tenant is a Thika Tenant within the meaning of the Calcutta Thika Tenancy (Amendment) Ordinance of 1952 and asking for investigation into that fact by a competent Court. In filing this application, the appellant had apparently in mind the provisions of section 5(2) of the Ordinance. As however no decree had been passed between the commencement of the Calcutta Thika Tenancy Act 1949, and the Calcutta Thika Tenancy (Amendment) Ordinance, 1952, the provisions of sub-section (2) of section 5 of the Ordinance have no application. It appears to me however that we are bound by the authority of the decision in *Mahadeb Ram Kahar* v. *Tinkori Roy* (1), to hold that the provisions of the Calcutta Thika Tenancy Act of 1949 as amended by the Calcutta Thika Tenancy (Amendment) Ordinance 1952, shall apply to this present case. It is not possible to decide on the record as it stands whether the defendant was a Thika Tenant within the meaning of the Calcutta Thika Tenancy Act, as though evidence has been given that he erected a structure on the land for residential and business purposes, the contention of the learned Advocate for the respondent that inspite of this he may not be a Thika Tenant within the meaning of the Act because of sub-clause (c) in clause (5) of section 2 as it now stands, namely, that Thika Tenant does not include a person "who holds such land under that another person and uses or occupies such land as a khattal," requires consideration. As there was no scope for this point being investigated at the time the suit was pending in the trial Court, evidence was not directed to this point. It is therefore proper that this matter should be properly investigated.

I would therefore set aside the decree of the Courts below in so far as it is for ejectment of the defendant and direct that the case be disposed of by the Court below in accordance with law after giving both parties opportunity to adduce evidence on the question whether the defendant is a Thika Tenant. If the Court finds that the defendant uses the land as a khattal, the decree for ejectment will be confirmed

(1) (1954) 58 C.W.N. 651.

and the appeal there from dismissed. If the Court decides that he does not use the land as a khattal and is a Thika Tenant within the meaning of clause (5) of section 2 of the Calcutta Thika Tenancy Act, he will transfer the case for disposal to the Controller. The decree for arrears of rent as passed by the Court below will stand. As the decree for mesne profits must be varied in view of the order we have passed as regards—ejectment, I think it right that instead of the decree for mesne profits we should give the Plaintiff a decree for Rs. 999/6/- for the period of occupation of the land by the defendant from the date of termination of the tenancy till the end of Pous 1361 B.S. If in respect of this period the defendant has deposited any amount with the Rent Controller, the defendant will be at liberty to withdraw it.

The parties will bear their own costs in this Court.

B. K. Guha, J. :—I agree.

Appeal allowed.
Case remanded.

B N.B.

APPELLATE CIVIL.

Before Mr. Justice Renupada Mukherjee.

CIVIL.

1955.

January, 12.

KANAK LATA DASSI
v.
BEJOY KRISHNA ROY.*

Bengal Tenancy Act, Sub-section (2) of Section 22—Proviso to the said Sub-section—Its implication—Distinction between Sub-section (2) of Section 22 of Bengal Tenancy Act and Sub-Section (2) of Section 22 of Behar Tenancy Act.

Proviso to Sub-section (2) of Section 22 of the Bengal Tenancy Act, as amended by the Amending Act IV of 1928, clearly lays down that, where a co-sharer landlord acquires the holding of a raiyat by auction purchase at a sale in execution of a decree or of a certificate under the Bengal Tenancy Act, he shall not hold the land comprised in the holding as a raiyat but shall hold the land only as a proprietor or tenure-holder as the case may be. The clear implication of the proviso is that the holding will become extinct and the tenure-holder or proprietor will remain in possession of the land of the holding only in his capacity as a landlord subject to the burden of payment of a fair and equitable sum to his co-sharers. The Legislature apparently treats a case of acquisition of raiyati land by a co-sharer landlord by auction purchase at a rent sale on a different footing from acquisition by other means.

Where an owner of a Towzi auction-purchased at a rent sale a rayati holding under the Towzi and subsequently on a partition of properties between him and his co-sharers the Towzi was allotted to his co-sharers and he lost his title to the Towzi, it was held that with the loss of his title to the Towzi he also lost all right to retain possession of the land previously comprised in the raiyati holding.

Distinction between Sub-section (2) of Section 22 of Bengal Tenancy Act and Sub-section (2) of Section 22 of Behar Tenancy Act, pointed out.

Upendra Pratap Narain Sahi v. *Dulhin Ishwarwati Kuer and another* (1) distinguished.

* Appeal from Appellate Decree No. 254 of 1950 against the Decree of Sri J. C. Majumdar, 1st Additional District Judge of Zillah 24-Parganas, Alipore in T.A. No 775 of 1948 dated 8th November, 1949, affirming the Decree of Sri J. S. Chatterjee, 5th Sub-Judge at Alipore dated 19th June, 1948.

(1) [1950] A I.R Pat. 115.

Prana Chandra Roy v. *Mathura Mohan Saha* (1) referred to

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Kanak Lata Dassi
v.
Bejoy Krishna Roy.

Appeal by the Plaintiff.

Suit for declaration of title and possession.

The material facts will appear from the judgment.

Joy Gopal Ghose for he Appellant.

Abinash Chandra Ghosh for the Respondent.

The judgment of the Court was as follows :—

January, 12.

Renupada Mukherjee, J. :—The short point of law which arises in this appeal is whether a co-sharer landlord who purchases a raiyati holding in execution of a rent decree loses all his rights to the land including the right to retain possession upon his losing title to the Towzi under which that holding is held.

It is an admitted fact that Priya Nath Roy, the original plaintiff, appellant of this appeal who was the owner of Towzi No. 2939 at the relevant time purchased a raiyati holding of one Khaira Sardar in execution of a rent decree. The co-sharers of the plaintiff appellant were parties to that decree and it is not disputed that the auction sale at which the plaintiff purchased the holding was a rent sale within the meaning of Chapter 14 of the Bengal Tenancy Act. It is not also disputed that the original plaintiff was in possession of the land comprised in the raiyati holding on payment of a fair and equitable sum to his co-sharers. It is further admitted that on a partition of properties between Priya Nath Roy and his co-sharers, Towzi No. 2938 was allotted to other co-sharers and Priya Nath lost his title to this Towzi. The only question which arises in this appeal is whether with the losing of his title to the Towzi, Priya Nath also lost his title to retain possession of the land which previously comprised the raiyati jama of Khaira Sardar. Priya Nath died during the pendency of the appeal in the High Court and his sole heir

(1) (1922) 36 C.L.J. 89.

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Kanaklata Dasi was substituted in his place. Both the courts below took the view that after the partition of the properties of Priya Nath and his co-sharers, Priya Nath ceased to have any sort of right in the disputed land. In this view of the matter the suit was dismissed by the trial court and that decision was confirmed in appeal. So the present appeal was filed by the plaintiff of the trial court.

The decision of this appeal depends mainly upon a construction of the proviso to Sub-section (2) of Section 22 of the Bengal Tenancy Act as amended by the Act of 1928. In order that the point in controversy between the parties may be properly appreciated, I may quote Sub-section (2) with the proviso here:

> "Nothing in this section shall prevent the acquisition by transfer, succession or in any other way whatsoever, of the holding of an occupancy-raiyat" or share or portion thereof, together with the occupancy rights therein by a person who is, or becomes, jointly interested in the lands as a proprietor or a permanent tenure-holder:
>
> Provided that a co-sharer landlord who purchases a holding of a raiyat at a sale in execution of a rent decree or of a certificate under this Act shall not hold the land comprised in such holding as a raiyat but shall hold the land as a proprietor or tenure holder, as the case may be, and shall pay to his co-sharers a fair and equitable sum for the use and occupation of the same. The rent payable by the raiyat to the other co-sharer landlords at the time of the transfer shall be regarded as the fair and equitable sum until otherwise determined in accordance with the principles of this Act regulating the enhancement or reduction of the rents of occupancy-raiyats."

Mr. Joy Gopal Ghose appearing on behalf of the appellant contended before me that a co-sharer landlord who purchases a holding of a raiyat at a sale in execution of a rent decree acquires an additional interest in the land comprised in the

holding in addition to his previously existing interest or title as a landlord. He contended that the co-sharer landlord who purchases such a holding certainly retains his superior interest as a proprietor or tenure holder as the case may be, and in addition to that interest, he acquires he interest of the out-going tenant for which he pays a fair and equitable sum to his co-sharers. Mr. Joy Gopal Ghose further argued that this second interest acquired under the rent sale is quite distinct and different from the superior right and although the co-sharer landlord may lose his superior right by partition of property, he retains the other right and so his co-sharers are not entitled to interfere with his possession as long as he continues to pay a fair and equitable sum for his possession of the land. In my opinion, this contention of Mr. Joy Gopal Ghose is not well-founded and it will appear to be so if the proviso to sub-section (2) of section 22 be read in the context of the sub-section itself. Sub-secion (2) of section 22 mentions the circumstances under which a co-sharer landlord may acquire a right in a raiyati holding of an occupancy raiyat by transfer, succession or in any other way. The Proviso to this sub-section, on the other hand, clearly lays down that where a co-sharer landlord acquires the holding of a raiyat at a sale in execution of a decree or of a certificate under the Bengal Tenancy Act, he shall not hold the land comprised in such holding as a raiyat but shall hold the land as a proprietor or tenure-holder as the case may be. The clear implication of this is that the holding will become extinct and the tenure-holder or proprietor will remain in possession of the land of the holding in his capacity as a landlord only subject to the burden of payment of a fair and equitable sum to his co-sharer. The Legislature apparently treats a case of acquisition of raiyati land by a co-sharer landlord at a rent sale on a different footing from acquisition by other means.

Mr. Joy Gopal Ghose drew my attention to a Full Bench case of Patna High Court *Upendra Protap Narain Sahi* v. *Dulhin Ishwarwati Kuer and another* (1) where the majority of the learned Judges decided that the provisions of section 22(2) of the Behar Tenancy Act as amended in 1907 entitled a co-sharer landlord, who has purchased a non-transferable or trans-

(1) [1950] A.I.R. Pat. 115.

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ferable occupancy holding between the years 1907 and 1923, to retain it in his possession as his purchased land on a partition taking place between him and his co-sharers. This decision is, however, based upon he Provisions of Bihar Tenancy Act, sub-section (2) of section 22 of which Act is wholly—different from the Act which is under my consideration. Section 22(2) of the Bihar Tenancy Act has been quoted at p. 117 of the report and it may be reproduced here:—

> "Section 22(2) as amended in 1907 runs as follows:—
>
> "If the occupancy right in land is transferred to a person jointly interested in the land as proprietor or permanenot tenure holder, he shall be entitled to hold the land subject to the payment to his co-proprietors or joint permanent tenure holders of the shares of the rent which may be from time to time payable to them; and, if such transferee sub-lets the land to a third person, such third person shall be deemed to be a tenure holder or a raiyat, as the case may be, in respect of the land."

The material portion of this sub-section shows that if the occupancy right in a land is transferred to a co-sharer landlord, he shall be entitled to hold the land subject to payment to his co-sharers theirs shares of the rent. Not only is the word "rent" used in the above section of the Bihar Tenancy Act significant but the section further shows that the co-sharer who makes the purchase will be entitled to hold the land of the tenancy.. In the Bengal Tenancy Act, there is an expression that the co-sharer who makes such a purchase shall not hold the land as a raiyat. This expression which practically connotes the extinction of the tenancy right is conspicuous by its absence in the relevant section of the Bihar Tenancy Act. That being the case there was ample justification for holding upon a construction of section 22(2) of the Bihar Tenancy Act that a co-sharer landlord may retain in his possession the land of a raiyati tenancy purchased by him even after a partition between him and his co-sharers. But there would be no justification for taking a similar view upon a construction of the relevant section of the Bengal Tenancy Act which lays

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down that the tenancy right would be extinct and the co-sharer landlord who purchases the holding would hold the land as a proprietor or tenure holder, as the case may be, subject to payment of a fair and equitable sum to his co-sharers. In my judgment, threfore *Upendra Protap Narain Sahi's Case* (1) has no application to the facts of the present case.

In view of what has been stated above, I am of opinion that a co-sharer landlord purchasing a raiyati holding at a rent sale has only one kind of interest in the land and that is the superior interest of the landlord. It follows, therefore, as a corollary that as soon as he loses his superior interest by partition, the right to retain possession of the land is gone and that right devolves upon the co-sharers in whom the superior right is vested by the partition. This interpretation of the present section 22(2) of the Bengal Tenancy Act gains some support from the case of *Purna Chandra Ray* v. *Mathura Mohan Saha* (2). That was no doubt a case decided under section 22(2) as applicable to East Bengal under Amendment Act of 1908, but then the terms of that section were substantially the same as the terms of the present sub-section (2) of section 22 of the Bengal Tenancy Act.

I, therefore, hold that the Courts below were right in refusing to declare the title of the Plaintiff to the disputed land and in dismissing the suit. The appeal must therefore, fail.

The appeal is, accordingly, dismissed with costs to the respondent.

Appeal dismissed.

P.K.D.

(1) [1950] A.I.R. Pat 115.
(2) (1922) 36 C.L.J. 89.

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Before Mr. Justice K. C. Das Gupta and Mr. Justice Debabrata Mookerjee.

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December, 23.

CHHATUMALL CHOWTHMULL.

v.

UNION OF INDIA REPRESENTED BY THE GENERAL MANAGER, EASTERN RAILWAY.*

Contract—Goods delivered on a railway in Eastern Pakistan for carriage to a station on the Eastern Railway in Indian Union—Goods received by the latter from the former—Pakistan railway, whether an agent for the consignor—Whether consignor can enforce contract against Eastern Railway.

Contract of bailment—Goods remaining in possession of Railway while liability as carrier ended—Warehousing goods on behalf of the owner and charges levied—Whether the Railway is liable as bailee.

When the goods are delivered to a station on a Railway in Eastern Pakistan for carriage to a station on the Eastern Railway in the Union of India and the goods are carried by the Pakistan Railway to the border and received by the Eastern Railway: *Held,* that the proper conclusion, from these circumstances, is not that the Pakistan Railway as a principal made a contract with the Eastern Railway but that it made the contract with the Eastern Railway as an agent of the consignor for carriage of the goods to the Station on the Eastern Railway and delivery to the consignee. The plaintiff as the principal can therefore enforce the contract.

When the goods remained in the possession of the Eastern Railway after their liability as carrier had ceased and the charges for demurrage and wharfage were realised under the Rules made under Section 47(1)(f) of the Indian Railways Act for warehousing goods on behalf of the owner: *Held,* that the Eastern Railway is liable under the Indian Contract Act as bailee on a contract of bailment for warehousing the goods and is therefore liable for the loss.

Application under Section 25 of the Provincial Small Cause Courts Act, 1887.

The material facts will appear from the judgment.

* Civil Revision Case No. 2801 of 1953, against an order of the Judge, Court of Small Causes, Sealdah passed in S.C.C. Suit No. 2409 of 1952 on 23rd July 1953.

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Priti Bhusan Burman and *Monohar Saha* for the Petitioner.

Bhabesh Narayan Bose for the Opposite Party.

The judgment of the Court was as follows:—

K. C. Das Gupta, J. :—The Petitioner brought this suit for recovery of damages for the loss of 10 maunds 16 seers of jute. His case is that on the 22nd August 1951, he delivered 125 bales of four maunds of jute per bale to the Station Master, Gaibandha, on a Railway in Eastern Pakistan, for carriage to Cossipore Road Station on the Eastern Railway in Union of India and that when the Consignment, after being unloaded from the Railway wagon at Cossipore Road was lying in the goods shed under the care of the Eastern Railway, it got soaked in rain on account of the negligence of the Eastern Railway and resulted in the loss of 10 mounds 16 seers. The defendant denied negligence but also pleaded that there was no contract between the plaintiff and the defendant and further that as the consignee had not taken delivery of the consignment within a reasonable time, the Railway was not liable. There was also a plea of want of notice under Section 77 of the Indian Railways Act and Section 80 of the Civil Procedure Code.

The Trial Court has accepted the defence contention that there was no proper service of notice under Section 80 of the Code of Civil Procedure, and further that there was no contract between the plaintiff and the defendant.

Before us, the learned Advocate for the defendant has admitted that the service of notice under Section 80 was sufficient and has asked us to decide the case on basis that the defendant withdraws the objection on the ground of lack of notice.

The first question for consideration is whether there has been any contract with the Eastern Railway which the plaintiff can enforce. It was the Pakistan Railway which accepted the goods at Gaibandha Station, agreeing to carry it to a place

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outside the Pakistan Railway. It is argued that what arrangements it made for carriage of the goods after it reached the border between India and Pakistan was no concern of the consignors; and that what happened was that the Pakistan Railway engaged the Eastern Railway as a sub-contractor for performing part of its contract with the plaintiff. If that were the position, it is reasonable to think that payment to the Eastern Railway for its charges would be made by the Pakistan Railway. From the Railway receipt, however, it appears that the payment to the Eastern Railway was made not by the Pakistan Railway but the consignor. It appears clear that after the goods were received by the Pakistan Railway from the consignor and were carried by the Pakistan Railway to the border, the goods were received by the Eastern Railway from the Pakistan Railway. From these circumstances, the proper conclusion, in my opinion, is not that the Pakistan Railway as a principal made a contract with the Eastern Railway but that it made the contract with the Eastern Railway as an agent of the consignor for carriage of the goods to Cossipore Road Station and delivery to the consignee. The plaintiff as the principal can therefore enforce the contract.

It is argued, however, that even if the respondent be liable on a contract of carriage of the goods to Cossipore, the liability ceased on the consignee refusing to take delivery of the consignment within a reasonable time. The argument is that the contract was to carry and to deliver and that the Railway has performed its contract if it has carried and has offered it for delivery. It has been held in a number of cases to which reference will be made presently that if the consignor's representative fails to take delivery within a reasonable time after it is ready for delivery by the carrier, the liability of the carrier ceases. It is important to consider, however, the further question whether after the liability of the carrier strictly so-called has ceased, there has or has not arisen liability on a further contract of bailment arising from the fact that the the Railway continues to keep the goods. It is helpful to remember in this connection the definition of bailment in Section 148 of the Indian Contract Act and the explanation thereof.

"A 'bailment' is the delivery of goods by one person to another for some purpose upon a contract that they shall when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the 'bailor'. The person to whom they are delivered is called the 'bailee'.

Explanation : If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes bailee and the owner becomes the bailor, of such goods although they may not have been delivered by way of bailment".

The question in this case is whether when the goods remained in the possession of the Eastern Railway after their liability as carrier had ceased the Railway was holding them as a bailee on a contract of bailment. It is necessary to consider in this connection clouse (F) of sub-section 1 of section 47 of the Indian Railways Act which provides that every Railway Company shall make general rules consistent with the Act for the purpose among others of regulating the terms and conditions on which the Railway Administration will warehouse or retain goods at any station on behalf of the consignee or owner. It is interesting to remember further that it was under the provisions of the law that rules were made as early as the 3rd July, 1902, providing for the terms and conditions under which the Railway Administration will warehouse and retain goods. The opening words of the Rules run :—

In exercise of the power conferred by section 47(3) of the Indian Railways Act, 1890 (Act 1A. of 1890), the Governor General in Council is pleased to sanction the following rules, made for and to be applicable to, all Railways in British India—under sub-section (1) clause (F) of the said section, for regulating the terms and conditions on which Railway Administrations will warehouse or retain goods at any station or depot on behalf of the consignee or owner".

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It proceeds thereafter to make different rules as regards wharfage, demurrage and other matters. Rule 3 of the rules for wharfage requires consideration. It is in these terms :—

"(i) A wharfage charge may be levied in respect of all goods not removed from Railway Premises before closing time of the day following that on which they are made available for delivery,

(ii) The charge referred to in sub-rule (1) shall not exceed per day or part of a day, one anna per maund or part of a maund, calculated—

(a) where freight is levied on weight, upon such weight; and

(b) where freight is levied on the vehicle in or on which the goods are carried, upon the carrying capacity of such vehicle.

(iii) The goods shall be warehoused either under cover or in the open as space may be available".

In the present case it appears that at the time when delivery was taken the consignor had to pay Rs. 1178/- on account of certain bales and Rs. 1228/- for the remaining 63 bales. It seems to me that even if these charges had not been levied it would have been reasonable to hold that in the absence of a clear contract to the contrary, the Eastern Railway when it kept the goods in its goods shed, kept them as bailee; but whether or not that be so, it cannot, I think, be said in the face of these facts of realisation of wharfage charges under the rules which purport to regulate the terms and conditions upon which the Railway Administration will warehouse goods on behalf of the consignee or the owner, that the Railway was not acting as bailee. In my judgment this is a clear case of fresh contract of bailment as warehouse men.

Reliance was placed on the decision of *Lalji Raja and sons, firm,* -v- *The Governor General of India in Council representing Bengal Nagpur Railway* (1), where the Court expressed the view that where the consignee had refused to take delivery within a reasonable time, the liability of the Railway had ceased. It does not appear however from the report whether in that case wharfage or demurrage charge was paid. In the judgment there is no consideration of the question whether the fact that a contract of bailment could be implied from the realisation of wharfage or demurrage charges under the rules framed under section 47(1) (F) of the Indian Railways Act.

There is some reference to this in a case decided by the Allahabad High Court- *viz. Bengal and North Western Railway* -v- *Mulchand* (2). In disallowing the claim for damages the learned Judges observed:—

> "The principles governing this question are contained in a clear statement by Chief Justice Cockburn in the course of the judgment in *Chapman* -v- *Great Eastern Railway Co.* (3). The contract of the carrier being not only to carry but also to deliver, it follows that the custody of the goods, as carrier must extend beyond the period of their transit. A reasonable time must be allowed for the exigencies of traffic and for the convenience of the consignee to whom delivery has to be made. And when the carrier is ready to deliver, the recipient is allowed reasonable time, and nomore, to take delivery. But he cannot for his own convenience or by his own laches extend the liability of the carrier beyond a reasonable time. In that case the goods having arrived at their destination both on the 24th and on the 25th of the month, were destroyed by fire on the 27th on which date also at a later hour the plaintiff who was the consignor and consignee called for the goods. It was held that the liability of the Company as carriers had ceased.....No explanation of the delay be-

(1) (1950) 54 C.W.N. 902.
(2) (1920) I.L.R. 42 All. 655.
(3) (1880) 5 Q.B.D. 278.

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tween the unloading on the 13th of May, and the so-called breach of duty on the 22nd of May, was attempted by the plaintiff or required of the defendants. It is clear that the contract of carriage was over. To hold otherwise would be to impose a wholly unreasonable burden upon carriers".

Their Lordships therefore proceeded to say:

> "The Railway Company might be responsible as warehousers, when a somewhat different set of considerations would arise, if any evidence had been led to show that such an arrangement was either expressly or impliedly made. The charge for demurrage does not necessarily give rise to such an implication, nor would any duty rest upon the Company for breach of which they have been held liable by the lower appellate court until such an arrangement had begun".

With due reference to the learned judge who decided this case, I am of opinion that they entirely overlooked the provisions of the law under which charges for demurrage and wharfage are realised. As has been mentioned, these charges are realised under the rules made under section 47(1) (F) of the Indian Railways Act for warehousing goods on behalf of the owner.

Our attention was drawn to the observations made by Zafar Ali, J. *in Secretary of State* -v- *Har Krishna Das, Kura Mal,* (1) where his Lordship says:—

> "It is not the business of the Railway Administration to work as a warehouse man or a bailee for hire. Its proper function is that of a public carrier and it is only in connection with the performance of its duty as a carrier that it is held responsible as a bailee. The duty as a carrier is discharged on the arrival of the goods at their destination and it is not for the Railway Administration to keep the goods after that as a warehouseman or a bailee for hire. The consignee on the other hand is expected to take

(1) (1925) I.L.R. 7 Lah. 379.

delivery within a time fixed by the rules and if he neglects to do so the Railway Administration can claim demurrage and not hire".

In this case also the learned Judges omitted to notice the Provisions of section 47(1)(F) of he Indian Railways Act and the fact that it was under the rules for regulating the terms and conditions on which the Railway Administration will warehouse or retain goods on behalf of the consignor or owner that the charges are realised. In the face of this it is not possible for the Railway Company to say that they have not worked as warehousemen.

I have, therefore, come to the conclusion that the Eastern Railway is liable under the Indian Contract Act as bailee on a contract of bailment for warehousing the goods and is therefore liable for the loss.

In paragraphs 9 and 10 of the written statement the defendant made the following statement:—

9. The suit consignment was received at destination in due course as alleged in the plaint but no one on behalf of the consignee having turned up to effect delivery of the same they were kept in goods shed. There was a heavy shower in Calcutta on 13.9.51 which not only flooded the goods shed but the whole town of Calcutta—a circumstance over which the Railway had no control. It was 'Vis Major'. The alleged damage by wet was apparently due to heavy rains and the consignee's own laches and negligence in not effecting delivery of the consignment when the goods reached destination and were available for delivery. It was incumbent on the consignee to watch and take delivery. The alleged short certificate was granted without prejudice and the Railway never admitted its liability for the alleged loss and or damage in the damage certificate.

10. This Railway took as such care and caution as was required of a prudent bailee so long as the goods

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remained in its custody and are in no way liable for the alleged loss and or damage. They are also not guilty of gross negligence and laches as falsely alleged. This defendant denies its liability to pay Rs. 728/- or any portion thereof, denies that the value of the goods was at Rs. 76/- per maund and denies all other allegations."

A some what inconsistent case was later made by an amendment of paragraph 9 by adding the following words:—

"This defendant further begs to submit that the consignment was received at destination in "STU" (Santahar) seals in tact wagon and on unloading the contents, some of the bales were found in damage by wet condition and as such this Railway is not at all liable for the alleged loss and/or damage. Message was duly issued to all concerned."

If the Eastern Railway could have proved that when it received the goods it was already damaged there might have been some scope for the argument that the loss had not been due to negligence on their part. A part from the fact that the case as originally made in paragraph 9 of the written statement, was that the goods were damaged when the goods were in the goods shed, the Railway has produced no evidence to show that the goods were already damaged when it came into their possession as warehousemen.

In these circumstances I am of opinion that the Plaintiff's suit must be decreed for the full amount of Rs. 728/-.

I would accordingly make this Rule absolute, set aside the order passed by the learned Courts below and order that the suit be decreed with costs here and below.

Debabrata Mookerjee, J. :—I agree.

Rule made absolute.

B.N.B.

CIVIL REVISION

Before Mr. Justice H. K. Bose

BROJO GOPAL SARKAR

v.

COMMISSIONER OF POLICE, CALCUTTA, & Ors.*

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1955

March, 10.

Calcutta Suburban Police Act, 1866, Sections 12 and 13—Whether a special constable holds a 'Civil Post' under the State within the meaning of Section 311 of the Constitution of India—Whether entitled to the privileges and protection afforded by Article 311 of the Constitution.

A person appointed a Special Constable of the Calcutta Police by the Commissioner of Police, Calcutta, under Section 12 of the Calcutta Suburban Police Act, 1866, and vested with the powers functions and privilages of a Police officer was after some length of time asked to tender his resignation, which he did not do. He thereafter received an order made by the Deputy Commissioner of Police, Calcutta, discharging him from the Calcutta Police constabulary. He thereupon sent a representation to the Commissioner of Police, Calcutta, praying for an opportunity to show cause against the action taken against him and for reconsideration of the order of discharge. This representation was rejected by the Commissioner of Police. As a last resort he has made an application to the High Court under article 226 of the Constitution of India for a writ in the nature of *certiorari* for quashing of the order of discharge. In this application under Article 226 the validity of the order of discharge has been challenged on the ground that it contravenes the provisions of Article 311 Clauses (1) and (2) of the Constitution :

Held—that the status of a Special Constable appointed under Section 12 of the Calcutta Suburban Police Act, 1866, is for all practical purposes the same as that of an ordinary officer of the Police force excepting that he renders his services without remuneration and that he pays for his own uniform ; that, an ordinary officer of the regular Police force being entitled to the privileges and protection granted by Article 311 of the Constitution, he also is entitled to the privileges and protection granted by the said Article ; that, although his office of a Special Constable continues only so long as the temporary emergency within the meaning of Section 12 of the Calcutta Suburban Police Act continues, he is nevertheless the holder of a Civil Post under the State of West Bengal within the meaning of Article 311 of the Constitution ; that it was only reasonable and proper that he ought to have been allowed an opportunity of showing cause against the action taken against him ; that it was contrary to the provisions of Article 311 (1) of the Constitution of India that he was discharged by an authority Subordinate to that by which he was appointed.

*Civil Revision Case No. 2782 of 1952.

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Commissioner of Police, Calcutta

Application under Article 226 of the Constitution of India for a writ in the nature of *certiorari*.

The material facts will appear from the judgment.

Anil Kumar Das Gupta and *Jyotish Bose* for the Petitioner.

Hemendra Kumar Das, Senior Government pleader and *Smriti Kumar Ray Chowdhury* for the Opposite parties.

The judgment of the Court was as follows :—

March, 10.

H. K. BOSE, J.:—This is an application under Article 226 of the Constitution for a writ in the nature of certiorari for quashing of an order of discharge, dated 30th July, 1952, passed by the Deputy Commissioner of Police, Calcutta, and an order, dated 18th August, 1952, passed by the Commissioner of Police, Calcutta.

On 31st March, 1950, the Petitioner was appointed a Special Constable of the Calcutta Police by the Commissioner of Police, Calcutta, under section 12 of the Suburban Police Act, 1866, and he was vested with the powers, functions and privileges of a Police Officer. Thereafter he was made a Section Leader of South Group (1) Alipore Section Special Constabulary with effect from 7th October, 1950. It appears that shortly after the appointment of the petitioner as a Special Constable a representation was made by some people of the locality on 19th May, 1950, characterising the petitioner as an anti-social element and praying for an enquiry against him. But subsequently on 27th May, 1950, a letter was written to the Deputy Commissioner of Police by several other members of the locality recommending the petitioner to be a popular and influential man of the locality. No action was however taken upon the representation by the Police Authorities. It is alleged that towards the second week of June, 1952, the petitioner was sent for by the Deputy Commandant of the Calcutta Special Constabulary and the petitioner was asked to tender his resignation on the ground that some representation had been received against the

petitioner from certain persons of the locality. The petitioner, however, did not tender his resignation. On or about the 30th July, 1952, the petitioner received an order made by the Deputy Commissioner of Police Calcutta discharging the petitioner from the Calcutta Police Constabulary with effect from date, on the ground that he was not likely to become an efficient member of the Force. A copy of this order is annexed to the petition and marked B. On 5th August, 1952, the petitioner sent a representation to the Commissioner of Police, Calcutta, praying for an opportunity to show cause against the action taken against him and for reconsideration of the order of discharge. It was further pointed out in this representation that in making the order of discharge the principles of natural justice had been violated.

The said representation was, however, rejected by the Commissioner of Police by his order, dated the 18th August, 1952. A copy of this order is annexed to the petition and marked D.

The petitioner challenges the validity of the order of discharge, dated the 30th July, 1952, on the ground it contravenes the provisions of Article 311, clauses (1) and (2) of the Constitution.

Mr. Anil Kumar Das Gupta, the learned Advocate for the petitioner has submitted that the order of discharge is an illegal order as it was made by an authority subordinate to that by which the petitioner was appointed and inasmuch as the said order was passed without giving the petitioner a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. According to Mr. Das Gupta the petitioner while holding the office of a Special Constable was holding a civil post under the State of West Bengal within the meaning of Article 311 of the Constitution and consequently the petitioner is entitled to the benefit or protection afforded by Article 311 clauses (1) and (2) of the Constitution.

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Mr. Smriti Kumar Ray Chowdhury the learned Advocate for the respondents has on the other hand submitted that Article 311 has no application to the case of the petitioner. It is pointed out by Mr. Ray Chowdhury with reference to the counter affidavit, affirmed by the Deputy Commissioner of Police that the Calcutta Police Special Constabulary is purely a voluntary non-communal and non-political organization which has been formed with the object of checking rowdism and lawless activities by assisting the regular Calcutta Police Force in the maintenance of law and order in the city and its suburbs, and the members do not receive any remuneration whatsoever from the Police Administration, and they are required to purchase their uniforms at their own cost, as the organization is a voluntary one. Consequently the petitioner cannot be regarded as a person who is a member of a civil service of the State of West Bengal or as holding a Civil Post under the State of West Bengal.

It appears to me that the contention of Mr. Das Gupta is correct.

Section 12 of the Calcutta Suburban Police Act (Bengal Act II of 1866), is as follows :—

"The Commissioner of Police may of his own authority appoint special police officers to assist on any temporary emergency." Section 13 of the Act is as follows :—

"Every Special Police officer, so appointed shall have the same powers, privileges and protection and shall be liable to perform the same duties, and shall be amenable to the same penalties and be subordinate to the same authorities as the ordinary officers of Police".

It is therefore clear that the status of a special constable appointed under section 12 of the Act is for all practical purposes the same as that of an ordinary officer of the police force excepting that he renders his services without remuneration and he pays for his own uniform. Section 13 confers on the petitioner the same powers, privileges and

protection which are available to an ordinary police officer. There is no doubt that an ordinary officer of the regular police force is entitled to the privileges and protection granted by Article 311 of the Constitution. That the members of the regular police force of Calcutta are members of a civil service under the State of West Bengal or are persons, who hold civil posts under the State, admits of no doubt. The words "civil service" and "civil post" are used in contradistinction to service in, or post under the "defence forces" of the Government of India. It is true that the petitioner does not belong to the cadre of any regularly constituted service. His office of a special constable continues, so long as the temporary emergency within the meaning of section 12 of the Calcutta Suburban Police Act continues. But he is nevertheless holder of a civil post. A discussion of the meaning of the expression "civil post" is to be found in the case of *Md. M. Quidwai* V. *Governor General in Council.* (1)

Mr. Roy Choudhury has however drawn my attention to the cases reported in *Mangal* V. *State of Punjab* (2) and *Kumaran* V. *State of Travancore Cochin* (3) but I do not think that the cases are of any assistance to him.

It appears from Phillips Constitutional law (of Great Britain and Commonwealth) (1952 ED) P. 246 that the following definition of the "civil service" has been suggested for general purposes : "the body of officials in the service of the Crown, who discharge duties belonging to the exercise of the King's Executive powers but not being members of His Majesty's naval, military or air forces and not being the holders of political offices" (Mustoe, Law and organisation of the British Civil Service, Page, 26)

In the case of *Kartar Singh* V. *State of Patiala & East Punjab States Union* (4) it has been held that an employee on the contingency staff is not a person in whose case the

(1) [1953] A.I.R. All 17.
(2) [1952] A.I.R Pun. 58
(3) [1952] A.I.R. Travancore-Cochin 264
(4) [1955] A.I.R. Pepsu 25

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Provisions of Art. 311 of the Constitution will apply. But the position or status of the petitioner differs materially from an employee on the contingency staff and hence this decision also is of no assistance to the petitioner.

It has also been submitted by Mr. Smriti Kumar Roy Chowdhury that a person not entitled to any pay or remuneration for services rendered by him cannot be said to be holding "a civil post" within the meaning of Art. 311 of the Constitution. I am unable to accede to this contention. As pointed out by Mr, Anil Kumar Das Gupta, the following passage in Phillip's Book on Constitutional. Law (1952 ED) page 245 has a material bearing on the point at issue—

"There is no formal definition of" Crown Servant "though we may say that generally he is appointed by or on behalf of the Crown to perform public duties which are ascribable to the Crown ; usually, but not necessarily, he is paid by the Crown out of the Consolidated Fund or out of monies voted by Parliament. He may serve without pay and modifications must be made for servants of the Crown in Dominions and Colonies".

So, the mere fact that the holder of an office under the Government does not get any remuneration, does not make him any the less a holder of a "Civil Post" under the Government.

The definition of the expression "Public Officer" as given in section 2, clause (17), sub-clause (h) of the Code of Civil Procedure, 1908, shows that payment by the Crown or Government of salary or remuneration or commission for the performance of any public duty is no doubt a test for determining whether the officer is a Public Officer or not, but it is not the sole test. The various sub-clauses (a) to (g) of caluse (17), section 2 of the Code indicates that a person will be regarded as a Public Officer if he answers the description given in those various clauses, no matter whether he receives any pay or not. Thus an officer of the Crown or Government whose duty it is as such officer, to prevent offences, to give information of offences, to bring offenders

to justice or to protect the public health, safety or convenience [Sub-clause (f) of clause 17 of section 2 of the Code of Civil Procedure] will be regarded as a Public Officer, even if he does not receive any pay or remuneration for the performance of his duties. In my view this contention of Mr. Roy Chowdhury has no substance. If this contention is accepted as correct then even an Honorary Magistrate cannot be regarded as a person holding a civil post under the State.

It will be a curious position indeed, if a Special Police Officer appointed under section 12 of the Calcutta Suburban Police Act remains subject to all the penalties or punishments which can be inflicted on ordinary police officers for remissness or neglect of duty, but he is deprived of the ordinary privileges and protection which are available to an ordinary Police Officer, including the privilege or protection afforded under Art. 311 of the Constitution.

A removal or dismissal from the office of a Special Constable may have the affect of casting a slur on the character of the officer concerned or may affect him materially in respcet of any other office which he may be holding under the Government or and any other employer. It is therefore only reasonable and proper that he should have an opportunity of showing cause against the action proposed to be taken against him.

Now what sort of opportunity is to be given to a civil servant is clear from the decision of the Privy Council in *High Commissioner for India v. I. M. Lall* (1), which has been approved of and followed by the Supreme Court of India in the case of *P Joseph John v. State of Trivancore-Cochin* (2). It is not disputed by the learned advocate for the Respondents that no such opportunity was given to the petitioner in the present case.

It has been held that the word "discharge" has the same connotation as "removal" and should be construed, so as

(1) (1948) L.R. 75 I.A. 225 ; 25 C.W.N 761
(2) [1955] S.C.A. 85

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to be included within the term "dismissal" : *Ramesh Chandra v. State of West Bengal* (1).

It is conceded that the petitioner has been discharged by an authority subordinate to that by which he was appointed. This was clearly contrary to the provisions of Art. 311 (1) of the Constitution : *State of Bihar* V. *Abdul Majid* (2).

In my view this petition must succeed. The rule is accordingly made absolute and the orders dated the 30th July, 1952 and 18th August, 1952, are quashed. In the circumstances of this case, I direct that each party will bear his own cost of this application.

P. K. D. *Rule made absolute.*

(3) [1953] A.I.R. Cal. 188
(4) [1954] A.I.R. S.C.A. 245—(247)

CIVIL REVISION.

Before Mr. Justice K. C. Das Gupta and
Mr. Justice D. B. Mookerjee.

NAGENDRA CHANDRA SETT

v.

JANENDRA CHANDRA SETT.*

Civil.
1954.
December, 23.

Application for amendment of an application for execution—Civil Procedure Code, Order XXI, Rule 17, and Section 151, where applicable—Significance of the expression "an application for execution, to the proper Court in accordance with law"—Application to take step in aid of execution of a decree within the meaning of Article 182 of the Indian Limitation Act.

Application for execution of a decree which was passed on 5.6.50 and which provided among other things for payment of a certain sum of money was filed on 14.5.53. In column 11 of the application in stating the mode in which the assistance of the Court was required the applicant stated that he wanted the money to be realised by attachment and sale of a house at No. 91/5, Upper Chitpore Road which was situate outside the jurisdiction of the Court in which the application for execution was filed. The application for execution was registered and service of notice under Or. XXI, Rule 22, C.P.C., was ordered. Thereafter the Court passed an order asking the decree-holder to apply for transfer of the decree to the Court within whose jurisdiction the house at No. 91/5, Upper Chitpore Road was situate. But the decree-holder did not file an application for transfer of the decree but filed an application for amendment of the application for execution, mentioning Or. XXI, Rule 17, and Sec. 151, C.P.C., as the provisions of law under which he applied for amendment of the application for execution. By the amendment the decree-holder sought to put a different property situate within the jurisdiction of the Court in place of the house at 91/5, Upper Chitepore Road. The application for amendment, in spite of the opposition of the judgment-debtor, was allowed by the Court below.

The view of the Court below that the amendment sought for was not material was held by the High Court to be entirely wrong. The substitution of a property situate within the jurisdiction of the Court for property situate out-side its jurisdiction was held by the High Court to be a material amendment in as much as without this substitution the application for execution was bound to fail.

As regards the question whether the Court below had jurisdiction to allow the amendment under Or. XXI, Rule 17, or under Sec. 151, C.P.C. The High Court's view was that, if the Court below had on the date the

* Civil Revision Case No. 2561 of 1953.

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application for execution was filed allowed the defect to be remedied then and there or had fixed a time by which the decree-holder was to remedy it and the defect had been remedied within the time fixed, the application for execution would become one in accordance with law presented on the date on which it was first filed. The direction given by the Court below to the decree-holder to apply for transfer of the decree was given long after the application for execution had been registered and service of notice under Or. XXI, Rule 22, C.P.C., had been ordered. The High Court held that the Court below had no jurisdiction to act under Or. XXI, Rule, 17, C.P.C., after the application for execution had been registered and service of notice under Or. XXI, Rule 22, C.P.C., had been ordered. The High Court also held that there was no case here for exercise of Court's power under Sec. 151, C.P.C.

The High Court held that, if the application for amendment was filed wtihin three years from the date of an application for execution to the proper Court in accordance with law or within three years from the date of an application to take some step in aid of execution of the decree, the application for amendment could properly be granted inasmuch as the application for amendment amounted in substance to an application for execution presented on the date on which the application for amendment was filed.

That the original application for execution was an application to the proper Court is clear because it was filed in the Court which passed the decree.

An application for execution is an application in accordance with law only when it is such that the Court can issue execution thereon. But in the present case the property against which execution was sought by the original application for execution being property situate out-side the jurisdiction of the Court in which the original application for execution was filed, the Court in which the original application for execution was filed was not in a position to issue execution upon the application. Therefore the original application for execution was not an application in accordance with law.

As regards the question whether it was in the present case an application to take some step in aid of execution within three years preceding the date on which the application for amendment was made, in the original application for execution the decree-holder also applied for issue of a notice under Or. XXI, Rule 22, C.P.C. Therefore there was an application for a step in aid of execution on the date on which the original application for execution was filed. The application was for amendment, which in the present case really amounted to a fresh application for execution with a list of properties situate within the jurisdiction of the Court, having others been made within three years of the application to take a step in aid of execution, it was held by the High Court that the application for amendment had been rightly allowed by the Court below.

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Application by the Judgment-debtor under Section 115 of the Code of Civil Procedure.

The material facts will appear from the judgment.

Binayak Nath Banerjee and *Sudhir Kumar Acharya* for the Petitioner.

Shyama Charan Mitter for the Opposite party.

The Judgment of the Court was as follows:—

December, 23.

K. C. Das Gupta, J. :—The question for decision in the case is whether the learned Subordinate Judge, 24-Parganas acted without jurisdiction or irregularly in the exercise of his jurisdiction in allowing an amendment of an application for execution. A suit was instituted by the Harendra Chandra against several persons including Nagendra Chandra Sett and Janendra Chandra Sett for partition of different properties. Final decree was passed in that suit on the 5th June, 1950. That decree provided among other things for payment of Rs. 790/12/- as owelty money to Janendra Chandra by Nagendra Chandra Sett. Application for execution of the decree for this amount was filed in the 6th Court of the Subordinate Judge at Alipore, 24-Parganas on the 14th of May, 1953. In column II of the application in stating the mode in which the assistance of the Court was required the applicant stated that he wanted the money to be realised by attachment and sale of the immovable properties mentioned in the Schedule. The Schedule mentioed only one item of immovable property—the house at No. 91/5, Upper Chitpore Road, which was beyond the jurisdiction of the Subordinate Judges Court. The application was, however registered and notice under Order 21, rule 22 of the Civil Procedure was ordered. Thereafter, on the 26th June, 1953, the Subordinate Judge passed an order in the following words:—

> "As the property sought to be attached is outsaid the jurisdiction of this Court no attachment can be effected directly by this Court. Decree-holder to apply for the transfer of the decree by the 1st July, 1953".

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On the 29th June, 1953 the decree-holder filed an application for amendment, but not for transfer of the decree. Instead he applied mentioning Order 21, Rule 17, and Section 151 of the Code of Civil Procedure as the provisions of law under which he applied for amendment of the application for execution by putting in place of the property mentioned in the Schedule a different property which was within the jurisdiction of the Subordinate Judge's Court. The judgment-debtor objected to the prayer for amendment. The learned Judge, however over-ruled this objection and allowed the amendment. In allowing the amendment the learned Subordinate Judge stated :—

> "It may be that a material amendment of an execution petition cannot be allowed after the period of limitation expires. But furnishing a list of fresh property is not a material amendment when the application for execution is otherwise in accordance with law when presented".

I have no doubt whatsoever that the learned Subordinate Judge is entirely wrong in thinking that the amendment sought for was not material. Without the amendment the Subordinate Judge's Court was not in a position to execute the decree. After the amendment the Subordinate Judge would be in a position to execute the decree. The substitution of the property within the jurisdiction of the Court for property outside the jurisdiction of the Court where without this substitution the application for execution was bound to fail cannot be treated as an amendment of no substance.

The question still remains, whether, though the reason given by the Subordinate Judge for allowing the amendment cannot be accepted, the amendment was rightly allowed in law.

The first question for consideration is whether the learned Subordinate Judge had jurisdiction to allow the amendment under Or. 21, r. 17 of the Code of Civil Procedure. Order 21, rule 17, provides that :—

> "On receiving an application for the execution of a decree as provided by rule 11, sub-rule (2), the

Court shall ascertain whether such of the requirements of rules 11 to 14 as may be applicable to the case have been complied with; and, if they have not been complied with, the Court may reject the application, or may allow the defect to be remided then and there or within a time to be fixed by it.

(2) Where an application is amended under the provisions of sub-rule (1), it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented".

If, therefore, the learned Subordinate Judge had on the date the application was filed allowed the defect, namely, the mention of property in the Schedule outside the jurisdiction of this Court, to be remedied then and there or had fixed a time by which the applicant was to remedy it and the defect had been remedied the application would become one in accordance with law and presented on the date when it was first presented, namely, on the 13th May, 1953. The learned Subordinate Judge did not, however, take any action under Order 21, rule 17 of the Code of Civil Procedure. The direction by him to the decree-holder to apply for transfer of the decree on the 1st of July, 1953 was made on the 20th June, 1953 long after the application had been registered and action taken upon it. It has been held in a number of cases that after the application for execution had been registered and action taken on it, it is no longer open to the Court to take action under Order 17, rule 1. In *Asgar Ali* v. *Troilokya Nath Ghose* (1) a Full Bench of this Court had to consider a case where the application for execution did not contain a list of property when presented. It was held that though the application was one within the meaning of Section 230 of the Code of Civil Procedure, 1882 no amendment could be made after the application had been admitted and registered. Petneram, C.J. and Prinsep and Pigot, JJ., held that unless the action was taken for allowing the application to be amended then and there or within a time fixed by the Court it was no longer open to the Court to grant amendment under Section 235 which corresponds to the present Order 21, rule 17, of the Code of Civil Procedure.

(1) (1890) I L.R. 17 Calc. 631 (F.B.).

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It must, therefore, he held that the learned Court had no jurisdiction to amend the application under Order 21, rule 17, C.P.C. It is equally clear that there was no case here for exercise of the Courts power under its inherent jurisdiction under Section 151 C.P.C.

If, however, the application for amendment was filed within three years from the date of the application to the proper Court in accordance with law or any application to take some steps in aid of the execution of the decree the application for amendment must be held to have been properly allowed; for in substance the application for amendment amounted to an application for execution presented on the 29th June, 1953.

That the application for execution that was filed on the 14th of May, 1953 was an application to the proper Court is clear because it was filed in the Court which passed the decree. The question is whether it was an application in accordance with law. If the question what makes an application "in accordance with law" was *res integra,* I would ask myself the question why the legislature used these words, 'in accordance with law' after the words 'proper court'. The proper answer to this question, in my opinion would be that the legislature thought it right that where a decree-holder had been diligent enough to take serious steps for executing the decree he would get a further extension of three years from the final order passed on his application and but only if the application was a serious application and not a make believe application. Unless an application is such that a Court can order execution thereon, it cannot be said to be a serious application. The answer to the question "when can an application be considered to be in accordance with law" would therefore be that an application should be held to be in accordance with law only when it is such that the Court can issue execution thereupon.

The question, however, is not *res integra.* In *Asgarali's Case* (*1*) that has already been mentioned the Full Bench pointed out that execution could not proceed in the case as

(1) (1890) I.L.R. 17 Calc. 631 (F.B.).

there was no list of properties. In *Gopal Chunder Manna* -v- *Gosain Das Kalay* (1) the Full Bench had to consider the question whether an application for execution which did not contain the right number of suit and the date of the decree was in accordance with law. The Full Bench accepted as correct the view expressed by Banerjee, J. in his referring order that though there was some informality in the application, the application, should be held in accordance with law as there was no material defect therein. In discussing what was a "material defect" his Lordships referred to the observation of Princep, J., in the case of *Asgar Ali* -v- *Troilokya Nath Ghose* (2), that as the application did not contain any list of property no execution could be taken thereon owing to its material defect and also to Princep, J's observation in *Gopal Sah* -v- *Janki Koer* (3), where an application was found to materially defective and therefore not in accordance with law. Princep, J.'s observation was :—

> "One of the errors committed by the decree-holder was in mis-stating the amount of his decree in a lesser sum than he was given, and the Subordinate Judge has consequently limited the execution to that smaller sum. If that had been the only defect the decree would have been capable of being executed for the smaller sum. But in other respects, which it is unnecessary to mention, the application failed to comply with the requirements of Sections 235, 236, 237 and 238".

It is clear from this referring judgment that his Lordship considered the application for execution to be one in accordance with law in spite of the formal defect inasmuch as it was possible for the Court to issue execution thereupon. As already stated all the judges in the Full Bench agreed with the conclusion and the reasons given by Banerjee, J., in his referring judgment.

(1) (1898) I.L.R. 25 Calc. 217.

(2) (1890) I.L.R. 17 Calc. 631 (F.B.).

(3) (1895) I.L.R. 23 Calc. 217.

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In a much later case in *Pitambar Jana* -v- *Damodar Guchait* (1) the Court held that an application in which there were omissions with regard to the amount of interest to which the decree-holder is entitled and with regard to the amount of costs to which the decree-holder is entitled was in accordance with law. After referring to the previous cases, Suhrawardy, J., concluded in these words :—

> "On a consideration of the cases to which I have made reference and the other cases which have been cited at the bar, the conclusion to which I have arrived is that the expression "in accordance with law" in Article 182(5) should be taken to mean that the application though defective in some particulars was such upon which execution could be issued. If the omissions were such as to make it impossible for the Court to issue execution upon it, as was the case in *Asgar Ali* -v- *Troilokya Nath Ghose* (2), where the list of the properties to be attached and sold was not supplied with the application for execution, it should be held that such an application is not in accordance with law. But where the application is such as to enable the Court to take further steps in execution it cannot generally be said that such an application, if not defective in material and substantial matters is an application not in accordance with law. In the present case there was no bar to the Court levying execution for the lesser sum claimed by the decree-holder and in this view I hold that the application made by the decree-holder on the 25th August 1923 was an application in accordance with law and therefore the present application of the decree-holder is not barred by limitation".

In a recent decision in the case of *Sm. Akshay Kumari Debi* -v- *Nalini Ranjan Mukherjee* (3), Das, J., has followed this view of the law, viz., that where the application is such that execution can proceed it is an application in accordance with law. The same view has been taken in the Allahabad and Bombay High Courts

(1) (1926) I.L.R. 53 Calc. 664.
(2) (1890) I.L.R. 17 Calc. 631 (F.B.).
(3) (1950) 54 C.W.N. 815.

in several cases of which mention may be made of the recent cases of *Gopal Parsharam Namjoshi* v. *Damodar Janardan Bhagwat* (1) and *Munnu Chamar* v. *Hari Narain* (2). In my opinion it must be taken to be settled law that in order that an application can be considered in accordance with law within the meaning of Article 182 of the Limitation Act it must be such that execution can proceed thereupon. As on the present application it was not possible for the Court to issue execution that application was not in accordance with law. . . It is next necessary to consider whether there was any application to take some steps in aid of execution within three years preceding the date on which the application for amendment was made. In his referring order in *Gopal Chandra Manna* v. *Gosain Das Kolay* (3), Banerjee, J., expressed the view that even if the earlier "application of the 7th of July, 1891 was informal and defective as an application for execution of decree, it was at any rate, as pointed out by the learned vakil for the respondent, an application to take some steps in aid of execution, that is to say, to issue a notice under Section 248 of the Code which was here necessary, the decree having been passed more than one year before". Reference may also be made to the decisions of the Allahabad High Court in the cases of *Behari Lal* v. *Salik Ram* (4) and *Dhonkal Singh* v. *Phakkar Singh* (5). In the earlier case the application that was made for executing the decree did not state the mode in which the assistance of the Court was required whether by arrest and imprisonment of the judgment-debtor or by attachment of the property, but prayed for that the Court would under Section 216 of the Code of Civil Procedure, 1859 issue a notice to the judgment-debtor to show cause why the decree should not be executed against him. A notice was issued on him on the 28th March, 1875. It was held that the application was one to enforce or keep in force the decree and that limitation should be computed from the date the notice to judgment-debtor was issued. In *Dhonkal Singh* v. *Phakkar Singh* (5) a Full Bench of the Allahabad

(1) [1948] A.I.R. Bom. 353.
(2) [1946] I.L.R. All. 856.
(3) (1898) I.L.R. 25 Cal. 594.
(4) (1878) I.L.R. 1 All. 675.
(5) (1893) I.L.R. 15 All 84.

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High Court again held that the issuing of a notice under Section 248 of the Code of Civil Procedure, 1892 gives a fresh starting point for limitation under Art. 179 Cl. (5) of Schedule (*ii*) of the Indian Limitation Act, 1877, whether such notice is issued on a valid or on an invalid application for execution.

I respectfully agree with the view taken in the cases and hold that an application for notice under order XXI, rule 22 of the Code of Civil Procedure will be a step in aid of execution within the meaning of Article 182 of the Limitation Act.

In the present case we find that on the 14th May, 1953 on which the application for execution was filed the decree holder also filed an application for issue of notice under Order XXI, Rule 22 of the Code of Civil Procedure. This, in my opinion was an application for step in aid of execution and consequently a fresh application for execution would be within time if filed within three years from the 14th May, 1953. The application for amendment really amounted to a fresh application for execution with a list of properties within the jurisdiction of the Court and having been made within three years of the application to take steps in aid of execution was within time. I have, therefore, come to the conclusion that the learned Subordinate Judge acted rightly in allowing the amendment.

The Rule is, therefore, discharged with costs.

Debabrata Mukherjee, J. :—I agree.

Rule discharged.

P.K.D.

APPELLATE CIVIL.

Before Mr. Justice P. N. Mookerjee.

Civil.

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January, 10 & 25.

SAYED ALI MISTRI & Ors.

v.

KAYEM ALI SHEIKH & Ors.*

Benefits of a Contract, assignability of—Onus upon whom lies—Contrary intention—Express and implied—Absence of the phrase "heirs, assignees, administrators" in the contract, effect of.

Benefits of a contract, generally speaking, are assignable, subject, of course, to the Rule of a contrary intention to be found in Section 40 of the Indian Contract Act and Section 23(6) of the Specific Relief Act. The onus is undoubtedly on the person who pleads against assignability and he has to discharge it by proving the contrary intention. This contrary intention may be express as to be found in the second part of the Proviso to Section 23(6) of the Specific Relief Act; it may also arise by necessary implication, and one recognised illustration of this latter class is to be found in what are usually known as "personal contracts" or contract depending upon "the learning, skill, solvency or any personal qualification" of the assignor or the party to the contract, from whom the benefits of the contract are claimed under the particular assignment. The mere absence of the phrase "heirs, assignees, administrators" does not arise any such implication.

Sakalaguna Nayudú v. *Chinu Munnswami Nayakar* (1), *Vishweshwar Narsabhatta Gaddada* v. *Durgappa Irappa Bhakhar* (2), *Sital Pershad* v. *Luchmi Pershad Singh* (3) referred to.

Appeal by the Plaintiffs.

The material facts will appear from the judgment.

Syama Charan Mitter for the Appellant.

Bhabesh Chandra Mitter and Bejoy Kr. Bhose for the respondents.

The judgment of the Court was as follows:—

* Appeal from Appellate Decree No. 172 of 1950 against the decree of Sree S. Chatterjee, Sub-Judge 1st Additional Court of Zilla 24-Pargans, dated the 29th November, 1949 reversing the decree of Sree G. Kumar, Munsif 2nd Court Alipur, dated the 20th September, 1948.

(1) (1928) 48 C.L.J. 125.
(2) [1940] A.I.R. Bom. 389.
(3) (1883) I.L.R. 10 I.A. 120.

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P. N. Mookerjee, J. :—This appeal arises out of a suit for specific performance of a contract of re-sale of land. The plaintiffs who claim to be assignees from the Original Vendor (who was the intended vendee in the agreement for re-sale) and who succeeded before the trial Court are the appellants before me and their grievance is that their suit has been wrongly dismissed by the lower Appellate Court.

The relevant facts, leading upto the present litigation, are not now in dispute and they may be shortly stated as follows:—

Proforma defendant No. 3 Pear Ali Khan was the original owner of the suit properties. In December, 1941, he sold the said properties to defendant No. 1. Sabjan Mondal for Rs. 250/- by a kobala dated the 1st of that month, and registered on the 9th. On this last mentioned date (9th), there was a simultaneous Ekrarnama, or agreement for re-sale, Ext. 7, executed and registered by the vendee, Sabjan Mondal, in favour of the Original Vendor Pear Ali Khan, the relevant stipulation being that Pear Ali returned or paid back to Sabjan the said sum or consideration money of Rs. 250/- in the month of Chaitra of any year within 1354 B.S., Sabjan, (defendant No. 1), would be bound to reconvey the suit properties to him (Pear Ali). On February 16, 1944, Pear Ali instituted a suit (Title Suit No. 45 of 1944) against Sabjan Mondal and the present defendant No. 2 Kayam Ali Sheikh, in whose favour Sabjan had executed a Kobala in respect of the present suit properties on December 22, 1943. The suit was decreed by the trial Court on March 8, 1945, but, on appeal by the defendant Sabjan, it was dismissed on the ground that there was no valid and effective tender of the consideration money in terms of the agreement for re-sale (Ext. 7). This was on December 11, 1945, but, in the meantime, on the strength of the decree of the trial Court in his favour, Pear Ali had sold the suit properties to the present plaintiffs Syed Ali Mistri and Momena Bibi by two Kobalas, dated March 14, 1945, for a total sum of Rs. 400/-, out of which he deposited the sum of Rs. 250/- in favour of Sabjan Mondal in the Title Suit, referred to above for getting the re-conveyance in terms of the decree of the trial Court. On dismissal of the suit at the

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appellate stage, the said deposit was withdrawn by Pear Ali and, thereafter, the plaintiffs made a fresh tender of the said amount (Rs. 250/-) to the defendants (Nos. 1 & 2) in Chaitra, 1353 B.S. and asked for a re-conveyance under the Ekrarnama, Ext. 7 and this having been refused, the present suit was brought on April 12, 1947.

The suit was decreed by the trial Court, but, on appeal by defendant No. 2 Kayem Ali, it has again been dismissed by the lower appellate Court. Before the lower appellate Court only two points appear to have been urged in support of defendant No. 2's appeal, viz. (1) that the right to get a re-conveyance under the Ekrarnama, Ext. 7, was a mere personal right in favour of Pear Ali, not assignable in law, and as such there could be no re-conveyance at the instance of the present suit, and (2) that the appellant defendant No. 2 Kayem Ali was a bona fide purchaser for value without notice and so the Ekrarnama, Ext. 7, was not enforceable against him and the plaintiffs were not entitled to any relief in the suit.

On the second point, there is the concurrent finding of both the Courts below that defendant No. 2's Kobala, Ext. B, is a sham transaction without consideration and with angle notice of the Ekrarnama, Ext. 7, and the materials on record do not warrant a different conclusion. I, accordingly, accept the said finding.

The first question, however, does not appear to have been argued before the trial Court and we do not, therefore, get any assistance on this point from the judgment of the learned Munsif. The learned Sub-ordinate Judge, while rejecting the broad contention of defendant No. 2, who was the appellant before him, that a contract cannot be enforced except by the actual parties to it, has given him relief and dismissed the plaintiff's suit on the ground that the Ekrarnama, Ext. 7, not having mentioned "heirs, assignees, administrators," its benefits were not assignable in law and, accordingly, the plaintiffs as assignees from Pear Ali, were not entitled to a decree on the basis of the same. The propriety of this view is one of the matters for consideration in this appeal.

I am unable to accept this part of the judgment of the

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learned subordinate judge. Generally speaking, the benefits of a contract are assignable, subject, of course, to the rule of a contrary intention (vide Sec. 40 of the Indian Contract Act and Sec. 23(b) of the Specific Relief Act). That is the rule in England. That is also the rule in this country. The onus is undoubtedly on the person who pleads against assignability and he has to discharge it by proving the contrary intention. This contrary intention may be express, (Vide, e.g. the Second Part of the Proviso to Sec. 23(b) of the Specific Relief Act); it may also arise by necessary implification, and one recognised illustration of this latter class is to be found in what are usually known as "personal contracts", or contracts, depending upon "the learning, skill, solvency or any personal qualification",—to quote the language of Sec. 23(b) of the Specific Relief Act,—of the assignor or the party to the contract, from whom the benefits of the contract are claimed under the particular assignment. In the Ekrarnama, Ext. 7, I do not find any personal element whatsoever, nor do I find in it even the slightest indication of any contrary intention against assignability of its benefits by the entended vendee, Pear Ali. It is a contract for re-sale of land, pure and simple. It contains no express prohibition against assignment. There is nothing in the nature or subject matter of the contract to make it a personal contract, or to raise any necessary implication as to the requisite contrary intention against the assignability of its benefits. The mere absence of the phrase "heirs, assignees, administrators", on which the learned Subordinate Judge relied, is sufficient to raise any such implication. The general rule of assignability will, therefore, apply. If the absence of the phrase, quoted above, had significance assigned to such absence by the learned Subordinate Judge, not only assignees but also heirs would be precluded from availing themselves of the benefits of the contract. This would be manifestly absurd, particularly when the time for performance is spread over a period of seven years or more. This length of the period is also an argument in favour of assignability of the contract (Ext. 7). I do not, therefore, agree with the learned Subordinate Judge in holding that the benefits of the Ekrarnama, Ext. 7, were not assignable in law and the plaintiffs can claim no relief on the basis of the same.

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I am supported in my view by the Privy Council decision in the case of *Sakalaguna Nayudu* -v- *Chinna Munnswami Nayakar* (1) which afirmed the Madras decision reported in *Chinna Munnswami Nayudu* -v- *Sakalaguna Nayudu* (2). In the light of the authority, the law has been explained and elaborated in the case of *Vishweshwar Narsabhatta Gaddada* -v- *Durgappa Irappa Bhatkor* (3), where the two earlier Bombay cases, *Manager, Vithoba Madhav Shambhagi & Ors.* -v- *Madhav Dadomar Shambhag & Ors.* (4) and *Harkisandas Bhagwandas & Ors.* -v- *Bai Bhanoo* (5) were fully discussed. The still earlier case *Gurunath Balaji Mutalik Deshpande* -v- *Yamanava Kom Nalarav Dwan*, must share the same criticism as was made of *Manager, Vithoba Madhav Shambhagi's case* (3), in *Vishweshwar Narsabhatta Gaddada's Case* (4). The rule of general assignability appears now to be fairly established and the exception, founded on contrary intention, has to be proved by the Party, asserting it, to deprive the assignees of the benefits of the contract.

This is the true approach and the converse rule, apparently underlying the decisions *Gurunath Balaji Mutalik Deshpande's case* (6) and *Manager, Vithoba Madhav Shambhagi's case* (4) can no longer be said to be good law. The Privy Council decision in the case of *Situl Pershad* -v- *Luchmi Pershad Singh* (7) had special features which sufficiently disclosed the requisite contrary intention and warranted a finding that the cotract in the said case was a "personal contract". That case is no authority against the statement of the law, made above by me, I, accordingly, reject the reasons given by the learned Subordinate Judge in support of his judgment and accept the appellants' contention on the point.

It is urgued, however, by Mr. Bhabesh Chandra Mitter and Mr. Bejoy Bose, who appear for the contesting respondents, defendants No. 1 and 2, that there was neither in fact nor in

(1) (1928) 55 I.A. 243 ; I.L.R. 51 Mad 533 & 48 C.L.J. 125 ;
(2) (1925) I.L.R. 49 Mad. 387;
(3) (1918) I.L.R. 42 Bom. 344 ;
(4) [1940] A.I.R. Bom. 339 ;
(5) [1934] A.I.R. Bom. 171 ;
(6) (1911) I.L.R. 35 Bom. 258;
(7) (1883) L.R. 10 I.A. 129.

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law any assignment to the plaintiffs of Pear Ali's right to get a re-conveyance under the Ekrarnama, Ext. 7. This point does not appear to have been raised in either of the two Courts below and, in the circumstances of this case, I would have been fully justified to refuse leave to the raising of this new point, particularly when the time for performance of the contract expired only during the pendency of the suit in the trial court and about five months after the filing of the written defence. If this question had been saised in the wnitten statement, the plaintiffs would possibly have been able to remedy this alleged defect in time. That remedy is now lost by reason of lapse of time and it would be extremely unjust to accept this late submission of the defendants at this stage. I am not impressed by the general allegation in the written statement of defenadnt No. 1. It is too vague to suggest this aspect of the matter. It really attacked the plaintiffs' kobalas as sham transactions, which, however, was given up during trial and it only specifically averred that Pear Ali had no right to get a re-conveyance under the Ekrarnama, Ext. 7. There was not the slightest suggestion either in the written statement, or, at any stage in the courts below, that, by their kobalas, Exts. 1 and 1-A, the plaintiffs did not acquire Pear Ali's right to the reconveyance, if any, under the Ekrarnama, Ext. 7, even though it was specifically claimed in paragraph 9. of the plaint that the said right had passed to the plaintiffs under the said kobalas, Exts. 1 and 1-A. I, would not, however, rule out this argument on the technical ground, as, in my opinion, it has no substance and it fails on the merits.

The kohalas, Exts. 1 and 1-A, purport to transfer *inter alia*, the entire "right, title and interest (বিক্রীত সম্পত্তিতে আমার যাবতীয় সত্ব, দখল) of the vendor Pear Ali in the suit properties. At the date of the sale (March 14, 1945), the vendor Pear Ali had only the right to get the re-conveyance under the trial court's decree, then standing, on the basis of the Ekrarnama, Ext. 7. The kobalas, Exts. 1 and 1-A, were in the nature of anticipatory documents, purporting to transfer the title which would follow eventually from execution of the said decree, and, out of their consideration monies, the decretal amount (Rs. 250/-) which had to be deposited for getting the re-conveyance was actually deposited in court

by the decree-holder, Pear Ali. In this context, is is perfectly reasonable to hold that Pear Ali's right to the re-conveyance, as then recognised and merged in the said decree, was transferred by the kobalas, Exts. 1 and 1-A, and, on the setting aside of the said decree by the appellate court, his original right to re-conveyance under the Ekrarnama, Ext. 7, became vested in the vendees, namely, the present plaintiffs. I am unable to accept the respondents argument that, the kobalas, Exts. 1 and 1-A, having purported to transfer the properties which, strictly speaking, did not belong at the time to the vendor Pear Ali, nothing actually passed by or under the said documents and the plaintiffs acquired nothing. In my opinion, in the circumstances set out above, the plaintiffs, by these kobalas, Exts. 1 and 1-A, obtained at least the vendor, Pear Ali's right to get re-conveyance of the suit properties (which right, as I have already said, was validly assignable in law) under the Ekrarnama, Ext. 7. which at the time had merged in the trial court's decree, then standing in Pear Ali's favour, and which subsequently regained its old or original form on the setting aside of the said decree by the appellate court. I have no doubt in my mind that this was intention of the parties and also the effect of the two kobalas, Exts. 1 and 1-A, and the fact that Pear Ali who was made a party to the present suit as pro-forma defendant No. 3 did not controvert this position in spite of the specific allegation on this point in paragraph 9 of the plaint further confirms it. I do not see how any other view of the two kobalas, Exts. 1 and 1-A is possible. It is absured to think that the properties were transferred without the right to the re-conveyance which was the very foundation of title. It is impossible to separate the two and, in my opinion, the transfer of the present suit properties by the two kobalas, Exts. 1 and 1-A, with the entire right, title and interest of the vendor Pear Ali therein, involved and included and there can be no doubt on this point in the particular circumstances of this case,—assignment of the said vendor's right to the re-conveyance also. I hold, therefore, that there is no substance in this new argument of the respondents and I have no hesitation in rejecting it.

In the above view of the matter, I allow this appeal, set aside the pudgment and decree of the lower appellate court

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and restore those of the trial court.

In the circumstances of this case, I direct the parties to bear their own costs in this court and in the court of appeal below. The plaintiffs, however, will get their costs of the trial court from the contesting defendants.

Leave to appeal under clause 15 of the Letters Patent is asked for and it is refused.

P. N. Mookerjee, J. :—In terms of the judgment delivered on January 10, 1955, the document of re-conveyance is to be executed by respondents Nos. 1 and 2 within six weeks from this date. In default, the appellants will be entitled to have it executed and registered through Court at the costs of the said respondents by execution of the decree. Let this order be treated as part of the judgment, delivered on January 10, 1955 and let the decree be drawn up accordingly.

Appeal allowed.

B.N.B.

APPELLATE CIVIL.

Before Mr. Justice R. P. Mookerjee and Mr. Justice Renupada Mukherjee.

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Specific Relief Act, Sec 21 (d)—What contract can be specifically enforced—Principles governing assessment of damages—Measures of damages how to be determined.

Indian Trust Act, Sec 88—When attracted—When partnership not subsisting but there was an agreement to enter into a partnership—Whether Trust Act applies.

*Appeal from Original decree No. 121 of 1948 against the decree of Sri R. K Das, Sub-Judge of Zilla Jalpaiguri, dated 11th May, 1948.

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Indian Contract Act, Sec. 74—Penalty and liquidated damages whether recoverable simplicitor.

Damages for breach of Contract—What the Court should determine—When the maxim causa proxima non remola spectatur is to be attracted—When no specific amount of damages mentioned—Awarding of nominal damages—Whether substantial amount can be awarded.

Under Clause (d) of Section 21 of the Specific Relief Act, a contract which is in its nature revocable cannot specifically be enforced. Thus, a suit for specifically enforcing to execute a proper deed of partnership in accordance with the deed of agreement and to perform all other acts and deeds necessary to put the partnership in a complete legal basis is not maintainable where the partnership to be so entered is at will and revocable.

But where there is a breach of contract the plaintiff is entitled to damages. The principles governing assessment of damages on the breach of a contract are now well settled. The measures of damages in a contract for sale was held to be the difference between the contract price and the market price at the date of the breach. The date of repudiation is to be taken as the date of the breach.

Section 88 of the Indian Trust Act is attracted in the case of claims by one partner against another and such trust may arise either from actual fraud (as indicated in Secs. 89 and 90) or from constructive fraud (referred to in Secs. 91 to 93) as also from some equitable principles independent of the existence of any fraud as indicated in Sec. 94 of the said Act. But where there was no subsisting partnership but an agreement to enter into a partnership it is doubtful whether the relevant provisions of the Trust Act would be attracted.

Under Section 74 of the Contract Act, where in a contract certain sum is mentioned as liquidated damages to be paid to a party, in case of breach thereof, that party cannot recover simplicitor that sum whether as penalty or liquidated damages. He must prove the actual damages he has suffered. It is not necessary that the Court has to come to a decision that the penalty mentioned is an unreasonable one before the Court can proceed to assess the actual amount of damages.

In the case of a claim for damages for breach of a contract for entering into a partnership the Court is to determine what damages are fairly attributable to the breach as a natural result or consequence of the same. It will not be sufficient if the loss be merely a remote consequence or an accidental mischief, for in such a case the maxim *causa proxima non remota spectatur* will be attracted. All that is required to be found is that the loss is " a real loss or actual damage and not merely a probable or possible one."

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In the case of breach of duty under an agreement, in the absence of specific amount of damages, the party is to be presumed to have sustained damages which may be liquidated damages of in some cases, nominal damages Awarding of nominal damages does not connote that a trifling amount is to be assessed. Even when awarding nominal damages substantial amounts could be awarded. What is to be the amount of nominal damage depends on the facts of each particular case

The Lindsey Petroleum & Co. v. *Prospen Armstrong Hurd etc* (1) : *A. K. A. S. Jamal* v. *Moolla Dawood Sons & Co* (2) ; *Bhai Panna Singh* v. *Firm Bhai Arjun Singh* (3) ; *Hadley* v. *Basendale* (4) ; *Johnston* v. *Braham & Campbell* (5) ; *Salvesen* v. *Redesi Aktebalagat Nordstieram* (6); *Rolin* v. *Steward* (7) ; *Wilson* v. *United Countries Bank Ltd.* (8) *referred to.*

Appeal by Defendant No. 1.

The material facts will appear from the judgment.

Atul Chandra Gupta, Satindra Nath Roy Chowdhury and Sovendra Madhav Basu for the Appellants.

Naresh Chandra Sen Gupta and Jogesh Chandra Sinha for the Respondents.

The judgment of the Court was as follows :—

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R. P. Mookerjee, J. :—The plaintiff respondent filed the suit out of which this appeal arises praying for specific performance of a contract, in the alternative for declaration of title in respect of certain lands—the plaintiff and the defendants being partners, or for damages and certain other reliefs. The learned Subordinate Judge decreed the suit in part in a perliminary form holding *inter-alia* that the plaintiff was entitled to damages which were to be determined in the manner indicated in the judgment.

(1) (1874) L.R. 5 P.C. 221 ;
(2) (1915) L R. 43 I A. 6 ;
(3) 33 C.W.N. 949 (P.C) ;
(4) [1854] Exchequer. 341 ;
(5) [1917] 1 K.B. 586 ;
(6) [1905] A.C. 302 ;
(7) (1985) 14 C.B. 595 ;
(8) [1920] A.C. 102.

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The defendant No. 1 has preferred this appeal and it has been maintained that the plaintiff was not entitled to any relief. The plaintiff has also preferred a cross objection claiming a larger amount of compensation than what has been allowed.

Prabhudayal Agarwalla defendant No. 1 had been trying to obtain settlement from the Khas Mahal department of the Government a plot of land for starting a rice mill at Alipore Duars in the District of Jalpaiguri. Other parties also entered into competition for obtaining the said plot. The plaintiff was one of those who also attempted to obtain settlement. To avoid competition among themselves an agreement was executed on the 25th August, 1945 between the plaintiff Ram Kumar and the defendant Prabhudayal and Maidhan. They agreed that Prabhudayal alone would submit tenders for the settlement of the plot in question and such offer will be deemed to be on behalf of all three. Prabhudayal would be merely a benamdar for three of them and they as partners were to contribute their shares of capital within one month from the date of the execution of the pattah to be obtained from the Government; a regular deed of partnership for the mill and the business including the right over the land to be executed by them. Prabhudayal would have a -/7/- annas share and the other two would have 4½ annas share each.

In pursuance of the above agreement an offer was made by Prabhudayal alone on the 31st August, 1945. Ultimately the Khas Mahal Officer informed Prabhudayal on the 14th February, 1946 that settlement of the plot would be made with him at a certain annual rent and a lump sum selami. Prabhudayal was sent a copy of the order with the intimation that the lease would be liable to cancellation if the business be shared in partnership. On the 3rd April following a lease was actually executed to run for 30 years, subject to certain other terms and conditions. One of the conditions imposed was that in the event of failure to set up the mill in a working order within six months from the date of execution of the lease for whatever cause it might be, the lease was liable to be cancelled without any compensation. Rs. 2,050, fixed as selami was deposited by Prabhudayal. On the 17th April, 1946, a

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ceremony was held at the site for laying the foundation of the Mill.

On the 13th May, 1946 Prabhudayal wrote to Ram Kumar stating *inter-alia* that it had already been intimated by the former to the latter that as the Deputy-Commissioner of Jalpaiguri was against allowing a partnership business the idea of partnership between themselves had been abandoned. Prabhudayal accordingly took steps to start the Mill with his own money and as a personal business of his. A large sum of money had already been invested by him personally.

On the 8th June following Ram Kumar wrote back denying that the agreement previously entered into had been abandoned, or, that Prabhudayal had informed the former of the objections raised about a partnership business being started. Certain letters were exchanged between the parties repeating the allegations and counter allegations. The last of the correspondence was dated 9th September, 1946 and the present suit was filed on the 11th September.

Ram Kumar alone filed the suit for the alternative reliefs already mentioned. Defendant No. 1 resisted the plaintiff's claim on various grounds.

The Plaintiff claimed not only that the agreement dated 25th August 1945 had been acted upon but certain articles had been supplied by the Plaintiff for the building up of the mill. The learned subordinate judge on an examination of the evidence adduced before him came to the conclusion that the story set up by the Plaintiff about the supply of materials and the purchase of certain articles by him for the mill had not been proved. It was also held that the allegations made by defendant No. 1 that he had, before the execution of the lease, informed Ramkumar, the plaintiff, of the objections raised by the Deputy Commissioner about the starting of a partnership business as also the abandonment of the rights of the plaintiff under the agreement had not been substantiated. The business started on the disputed land by defendant, No. 1 alone was not partnership business and defendant, No. 1 himself was responsible for the breach of the contract in as much

as the plaintiff had not made any contribution so far as the selami for taking settlement of the land was concerned or for the construction of the mill.

The written agreement was found to contain all the terms settled amongst the parties regarding the business in question. As there was no mention about the duration of the partnership the partnership envisaged was merely a partnership at will. No useful purpose could be served by specific performance of the contract in question, however objectionable the conduct of defendant No. 1 might have been in the matter. The defendant No. 1 was responsible for the breach of the contract. The business started on the disputed land by defendant No. 1 is not a partnership business. With regard to the lands in question the plaintiff has only an equitable estate in 4½ anna share of it. The plaintiff is entitled to compensation for the equitable estate. The damages were to be assessed as indicated in the judgment. A Commissioner was to be appointed to ascertain the amount of damages in the light of the judgment of the learned subordinate judge.

Defendant No. 1 Probhudayal has appealed against the decision so far as it went against him. A memorandum of cross objection has also been filed on behalf of the plaintiff respondent directed against defendant No. 1 for the price of the material alleged to have been supplied by the plaintiff and for further compensation in respect of the contract in question.

It is contended on behalf of the defendant appellant that the learned subordinate judge should have held that the plaintiff had been informed by the defendant of the termination of the contract after the receipt of the letter from the Khas Mahal and before the intimation as conveyed by the letter dated 13th May, 1946.

We have been taken through the evidence but we are not satisfied that the defendant has been able to prove that he had sent any such intimation as alleged.

An alternation argument however was put forward on behalf of the defendant to the effect that from the conduct of

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the plaintiff it was only reasonable to conclude that the plaintiff had abandoned whatever rights or claims he had on the agreement to enter into the partnership. It is pointed out in this connection that the plaintiff did not take any steps to ascertain from the defendants as to when the lease was sanctioned by the Khas Mahal Authorities not to speak of ascertaining the terms of the lease. Even after the sanction had been obtained from the Khas Mahal the plaintiff had not been able to show that he had taken any steps for the starting of the mill. Reliance was placed in this connection *The Lindsay Petrolium & Co.*, v. *Prosper Armstrong Hund, Arban Farewell John Keng*, (1). The facts in the present case, however, are not such as to attract the line of reasoning adopted in that case.

We have noticed already that an application for lease had been filed near about August 1945 but the lease in question was not executed until the 20th March, 1946. Because of the long period during which the matter had been kept pending by the Khas Mahal Authorities it was necessary that the defendant should have given some information when the sanction was obtained. The plaintiff also had attempted to meet this latter case, but the same has not been accepted either by the trial court or by us. After the execution of the lease the events moved very rapidly. The foundation day ceremony by *Prabhudayal* alone was on the 17th April, 1946. On the 13th May following *Prabhudayal* purported to take up the position that the agreement had already been terminated and that fact had also been intimated to the plaintiff. On this question of fact also we accept the finding of the trial court. The period—which elapsed between the execution of the lease by the Khas Mahal authorities and the letter dated 13th May sent by the defendant to the plaintiff was so short that we would not be justified in drawing a conclusion as was done in *The Lindsay Petrolium & Co.'s Case* (1) at pages 239-240.

The attempt which was made on behalf of the defendant to prove that there was an actual abandonment of the rights

(1) (1874) L.R. 5 P.C. 221.

under the contract but the plaintiff has failed to prove the same.

Although there is no such case made in the written statement an attempt was made during the trial that Golap Chand D.W. 2, an officer of defendant No. 1 had on receipt of the Memorandum from the Deputy Commissioner during the absence of the defendant from Hashimara himself informed the Plaintiff and defendant No. 2 the very next day; the defendant thereupon is alleged to have abandoned the rights and interest under the contract. On a material part of the evidence Golap Chand is contradicted by Benoy D.W. 3 who had however been brought in to corroborate the former. The learned subordinate judge has given sufficient reasons for refusing to accept this belated case attempted to be made by the defendant. It is likely that on such information even if it had been given by Golap the defendant would have attempted to move in the matter and examine the details and the conditions of the lease. The story of abandonment has rightly been dismissed by the learned subordinate judge.

We may at this stage consider the allegations made by the plaintiff of the actual part played by him in the starting of the mill. It is not the case of the plaintiff that he had taken any part in the Foundation Day ceremony, and the evidence adduced to prove actual participation in the supply of articles for the mill are wholly insufficient to prove the allegation. In this court only a faint attempt was made to support this case but with no better success.

There was a concluded contract between the parties on the 25th August 1945 and the application for the lease was made thereunder. The parties had also agreed to enter into partnership to run a mill if the land were made available by the Khas Mahal authorities. The agreement was subsisting when steps were taken by the defendant for the erection the mill and the parties had not put an end to the same as alleged by one of them. The plaintiff has come up with various alternative payers and reliefs. One is for a declaration that the property described in the schedule belongs to the parties according to the shares indicated in the agreement. This payer

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cannot be entertained. There was an agreement for entering into a partnership but no such subsequent document was created. Title in the property in suit was vested in the defendant. It was at best an assit of a proposed partnership. Whether the defendant holds the land subject to the equities enforceable by the plaintiff will be considered hereafter.

The other alternative prayer is for directing the defendant to execute a proper deed of partnership in accordance with the deed of agreement and to perform all other acts and deeds necessary to put the partnership in a complete legal basis. Under clause (*d*) of section 21 of the specific Relief Act a contract which is in its nature revocable cannot specifically be enforced. In view of the terms of the agreement the partnership even if entered into would be a partnership at will and even if such a contract were it be specifically enforced it could be terminated immediately thereafter. Moreover, as observed by *Lindlay on partnerships* (11th Edition, page 582) on principles also such a contract should not be specifically enforced.

> "If two persons have agreed to enter into a partnership, and one of them refuses to abide by the agreement, the remedy for the other is an action for damages, and not, excepting in the cases to be presently noticed, for specific performance. To compel an unwilling person to become a partner with another would not be conducive to the welfare of the latter, not more than to compel a man to marry a woman he did not like would be for the benefit of the lady. Moreover, to decree specific performance of an agreement for partnership at will would be nugatory, in asmuch as it might be dissolved the moment after the decree was made; and to decree specific performance of an agreement for a partnership for a terms of years would involve the court in the superintendence of the partnership throughout the whole continuance of the term. As a rule, therefore Courts will not decree specific performance of an agreement for a partnership."

We are consequently required to consider the amount of damages which the plaintiff is entitled to. There had been a breach of contract for which the defendant is liable. That is the finding of the trial Court which we affirm for reasons already indicated above.

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A question has been raised as to whether damages are to be calculated on the basis that there has been a breach of contract or that the defendant had constituted himself as a trustee attracting the provisions contained in Sec. 88 of the Indian Trust Act.

Section 88 of the Indian Trust Act is attracted in the case of claims by one partner against another and such trust may arise either from actual fraud (as indicated in Secs. 89 & 90) or from constructive fraud (referred to in Secs. 91 to 93) as also from some equitable principle independent of the existence of any fraud as indicated in Sec. 94 of that Act. In the special circumstances of the case now before us there was no subsisting partnership but an agreement to enter into a partnership. On the parties entering into a partnership as under the agreement certain duties and responsibilities would be cast upon each. It is therefore doubtful whether in the peculiar circumstances of this case where parties were not already partners the relevant provisions of the Trust Act would be attracted. We do not however give a final opinion on this point as in our view the case is governed as giving rise to claims on the breach of a contract.

The principles governing assessment of damages on the breach of a contract are now well settled. The measures of damages in a contract for sale was held to be the difference between the contract price and the market price at the date of the breach. *A. K. A. S. Jamal* -v- *Moolla Dawood Sons. & Co.* (1). The date of repudiation is to be taken as the date of the breach. The special facts and circumstances of the present case are out of the ordinary. According to the agreement the parties were to contribute towards the capital cost as also other charges. At one stage it was argued that as the plaintiff had not made any contribution towards the capital as under the Agreement he was not entitltd to any benefits under the contract. A distinction, however, is to be made between the rights and liabilities of the partners as such and an agreement between two persons to execute a partnership

(1) (1945) L.R. 43 I.A. 6;

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deed and the conditions under which the partnership is to be run being specified therein.

The lerned Subordinate Judge has given the following direction for calculating the quantum of damages :—

"For the equitable estate of the plaintiff plaint land the damages should be the present market price of the plaintiff's -/4/- annas share of the plaint land minus the cost that were incurred in taking the lease of that share. The damages of the breach for the remaining portion of the contract should be one of the years net profit of the business started by the Defendant No. 1 on the plaint land. The plaintiff in the circumstances of the case may claim profit of any of the years from 1948 to 1950. It may be noted here that the total amount of damages under no circumstances will exceed Rs. 25,000/-.

A Commissioner is to be appointed to calculate the damages according to the direction given above. The method adopted by the learned Subordinate Judge is one which is not warranted by law nor is a practicable or a reasonable one".

On behalf of the plaintiff it was contended that he was entitled to Rs. 25,000/- being the amount mentioned in the agreement as liquidated damages. As laid down in *Bhai Panna Singh* -v- *Firm Bhai Arjun Singh* (1), where an agreement for sale provides that whichever party retracts from the contract will pay a certain sum as damages when the contract is broken, the other party cannot under Sec. 74 of the Contract Act recover simplicitor that sum whether as penalty or liquidated damages. He must first prove the actual damages he has suffered. It is not necessary that the Court has to come to a decision that the penalty mentioned is an unreasonable one before the Court can proceed to assess the actual amount of damages.

The damages are to be assessed on the basis of the natural and probable consequences of the breach within the general principles laid down in *Hadley* -v- *Bazendale* (2). The measure of damages very according to not only the

(1) (1929) 33 C W.N. 949 (P.C.).
(2) [1854] Exchequer 341.

time at which is brought but the special circumstances of the particular case. Contract may be of varied types and when it is not possible to calculate accurately or in a reasonable manner the actual amount of loss incurred or even when the plaintiff has not been able to prove the actual loss incurred the plaintiff is *prima facie* entitled in a breach of contract to recover nominal damages.

In the case of a claim for damages for breach of a contract for entering into a partnership it is not contended that no damages are incurred. The question before the Court is what damages are fairly attributable to the breach as a natural result or consequence of the same. It will not be sufficient if the loss be merely a remote consequence or an accidental mischief, for in such a case the maxim *causa poxima non remota, spectatur* will be attracted. All that is required to be found is that the loss "a real loss or actual damage, and not merely a probable or possible one". For the principles so enunciated reference may be made to *Jhonston* -v- *Braham and Campbell,* (1) and *Salvesen* -v- *Rederi Aktiebolaget Nordstjeran* (2).

If the partnership had been entered into in terms of the contract the plaintiff would have been bound to contribute for the partnership business and become entitled to an interest in the leasehold interest and the business itself. Moreover, the differences that have ensured and the conditions which were introduced by the Khas mahal authorities make it very doubtful whether they could have continued the partnership for any length of time. The partnership even if entered into would have been a partnership at will.

Although we are convinced that the plaintiff has suffered damages as a direct consequence of the breach of contract by Defendant No. 1, it is difficult to calculate the same with mathematical accuracy by instituting enquiries. The Defendant No. 1 is liable for a breach of duty as under the agreement; in the absence of specific amount of damages, the party is to be presumed to have sustained damages which may be liquidated damages or in some cases nominal damages. The same principle as applied between principals and agents may be applied. *Mayne an Damages* (eleventh edition, page 587)

(1) [1917] 1 K.B. 586;
(2) [1905] A C. 302.

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remarks that such principles "are infact applicable to any other case where compensation is sought for a breach of contract, and present a summary of general theory of damages".

Awarding of nominal damages does not connot that a trifling amount is to be assessed. Even when awarding nominal damages substantial amounts were awarded in *Rolin* -v- *Steward* (1) and *Wilson* -v- *United Countries Bank Ltd.* (2). What is to be the amount of nominal damages depends on the facts of each particular case. Keeping in view the relevant facts and circumstances of this case we allow Rs. 8,000/- (Rupees Eight thousand only) as damages in this case. The amount mentioned in the agreement is on the face of it unreasonable and excessive.

The appeal and cross-objection are allowed in part and the judgment and decree of the Court below are modified. The plaintiffs suit is decreed in part. He will be entitled to a decree for Rs. 8,000/- (Rupees Eight thousand only) against the defendants. The plaintiff will also get proportionate costs in the trial Court.

Each party will bear the respective costs in this Court.

Renupada Mukherjee, J. :—

I agree.

B. N. B. *Appeal allowed in part.*

(1) [1985] 14 C.B. 595;
(2) [1920] A.C. 102.

APPELLATE CIVIL.

Before Mr. Justice Renupada Mukherjee.

LOYA MAJHI AND OTHERS

v.

NIR DUTTA & ORS.*

Civil. 1955 *January, 12.*

Bengal Alienation of Agricultural Land (Act. V of 1944), Sections 8 and 10—Suit upon the allegation that the Order of the S.D.O. was obtained by the transferors by practising fraud, if barred by Section 10—Principles of construction res-judicata if bars the suit.

A sale-deed was executed on 19.10.1943 for a consideration of Rs. 250/-. An application for restoration of the land under the provisions of the Bengal Alienation of Agricultural land (Temporary Provisions) Act V of 1944 was filed before the S.D.O., Jhargram, on 22.2.1945 by the vendors. The application purports to have been allowed on compromise on 3.5.1945 and the sale was converted into a complete usufructuary mortgage. The transferee moved the District Judge of Midnapore in revision under the proviso to Section 10 of the above-mentioned Act for setting aside the order of the S.D.O., but he was unsuccessful. The transferee thereupon moved the High Court but the High Court held that it had no Jurisdiction to interfere. The transferee then filed Suit in the Munsif's Court at Jhargram for declaration that the Order of the S.D.O. was not binding upon him inasmuch as the compromise on which the order was based was a fraudulent transaction brought about by the transferors in the absence of the transferee by practising fraud upon the S.D.O. The Trial Court held that in view of the provisions of Section 10 of the Bengal Alienation of Agricultural Land Act the Suit was not maintained. But in appeal the District Judge, in the view that Section 10 did not exclude the Jurisdiction of Ordinary Civil Court to entertain a Suit of such discreption, held that the Suit was maintainable and remanded it for trial on merits. In Second Appeal the High Court affirmed the decision of the District Judge, holding that the scope of the previous proceeding under the provisions of the Bengal Alienation of Agricultural Land Act was quite different from the scope of the subsequent Suit filed in the Munsif's Court on the allegation that the compromise order of the S.D.O. was obtained by the transferors by practising fraud.

As regard the question of constructive *res judicata* it was not capable of being decided at that stage, because the relevant papers were not on the record. The appellants were, however, granted permission to raise the question in the Trial Court when the Suit would be heard on the merits. Sm. M. L. Chakravorty, District Judge of Zillah Midnapore in T.A. No. 152

* Appeal from Appellate Decree No. 285 of 1950 against the decree of of 1948 dated on 19th of December, 1949 reversing the decree of Sri S. K. Ghosh, Munsif, Jhargram dated the 27th of April, 1948.

Civil.

1955.

Loya Majhi v. Nir Dutta

Renupada Mukherjee, J.

Appeal by the Defendant.

Suit for declaration that compromise Order of a S.D.O. passed under the provisions of the Bengal Alienation of Agricultural Land Act was obtained by practising fraud.

The material facts will appear from the judgment.

Guru Prosad Ghosh for the appellants.

Apurba Charan Mukherjee for the respondents.

The judgement of the Court was as follows :—

January, 12.

Renupada Mukherjee, J. :— The facts involved in this appeal lie within a very narrow compass and there is no dispute about them. They may be briefly stated here : Loya Majhi, Appellant No. 1 and deceased Bikran, Predecessor—in—interest of appellants Nos. 2 and 3 of this appeal executed a sale deed in favour of one Bhola Nath Dutt, deceased predecessor of the respondents of this appeal on 19th October, 1943, for a consideration of Rs. 250/-. An application for restoration of the land under the provisions of the Bengal Alienation of Agricultural Land (Temporary Provisions) Act, 1944 was filed before the Sub-Divisional Officer, Jhargram, on 22nd February, 1945, by the vendors. The application purports to have been allowed on compromise on the 3rd May, 1945 and the sale was converted into a complete usufructuary mortgage terminating on the last date of Chaitra 1353 B.S. The transferee who was then alive moved the District Judge of Midnapore in revision under the proviso to Section 10 of the above Act for setting aside the order of the Sub-Divisional Officer but was unsuccessful. Against that order, the transferee moved the High Court but the High Court held that it had no jurisdiction to interfere. The judgment of the High Court is reported in the case of *Bholanath Dutt -v- Loya Majhi and another* (1).

Thereafter the transferee Bholanath Dutt filed the present suit in the Court of the Munsif of Jhargram for a declaration

(1) (1947) 51 C.W.N. 745.

Civil.

1955.

January, 12.

Loya Majhi v. Nir Dutta

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that the order was not binding upon him inasmuch as the compromise order in question was a fraudulent one obtained in the absence of the transferee by the transferors by practising fraud upon the Sub-Divisional Officer of Jhargram. The transferee died during the pendency of the suit and the present respondnts who are his heirs were substituted in his place. The suit was contested by the defendants who are now the appellants before me.

The trial Court held that in view of the provisions of Section 10 of the Bengal Alienation of Agricultural Land Act (Act V of 1944), the suit is not maintainable and so that Court dismissed the suit. In appeal the District Judge took a different view holding that Section 10 does not exclude the jurisdiction of the ordinary Civil Court to entertain the suit and so the lower Appellate Court remanded the suit for trial on the merits. Against this order the defendants have come up in second Appeal.

Mr. Ghose appearing on behalf of the appellants contended before me that the lower appellate Court was wrong in holding that the Civil Court was competent to try the suit and it should have held that Secion 10 of the Act mentioned above specifically ousts the jurisdiction of a Civil Court in this matter—Section 10 runs as follows :—

> "10. Neither the High Court nor any Civil Court shall have jurisdiction in any matter which the Collector is empowered to dispose of under this Act :—
>
> Provided that any person who is dissatisfied with any order of the Collector made under Section 4 or sub-Section (1) of Section 8 may within thirty days from the date of such order apply in the prescribed manner to the District Judge for the revision of such order and the decision of the District Judge thereon shall be final."

Mr. Ghose further contended that the matter has been set at rest by the previous decision of the High Court reported in *Bholanath Dutta* -v- *Loya Majhi* (1) and that it cannot be

(1) (1947) 51 C.W.N. 745.

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agitated any more in a fresh suit. I am unable to accept this contention as sound. The matter which was agitated in the previous proceedings giving rise to the revisional application before the High Court was whether the order of the Sub-Divisional Officer converting the sale into a complete usufructuary mortgage was a correct one or whether the order was liable to be set aside. This order was certainly passed by the Sub-Divisional Officer in consonance with the provisions of Section 8 of the Bengal Alienation of Agricultural Land Act, 1944 and so it could be challenged only in revision before the District Judge under the proviso to Section 10 of the Act. The main part of that Section excludes the jurisdiction of Civil Courts and also of the High Court in such matters.

Mr. Mukherjee appearing on behalf of the respondents contended that the scope of the present suit is quite different from the scope of the previous proceedings because in this suit the transferee alleged that the order was obtained by the other side by practising fraud upon him and also upon the officer who passed the order. I agree with Mr. Mukherjee that such matter does not come within the purview of Section 8 of the Act or under any other Section. It is true that the compromise was challenged by the transfree before the District Judge. But that was only in an incidental manner. The only pertinent question which arises in connection with the maintainability of the present suit is whether the matter involved in this suit is one which the Collector or the Sub-Divisional Officer was empowered to dispose of under the provision of the Bengal Act V of 1944. My answer to that question must be in the negative. That being so, I agree with the view of the lower appellate Court that the Munsif has jurisdiction to decide the suit and that the suit must be decided by him on the merits.

Another point raised by Mr. Ghose on behalf of the appellants is that the suit is barred by the principles of constructive *res-judicata*. In support of this contention Mr. Ghose relied upon some observations made by Ghulam Hasan, J. in the case of *Mohanlal Goenka* -v- *Benoy Krishna Mukherjee and others* (1). The observations to which my

(1) (1953) S.C.A. 475.

attention was drawn occur *at pp. 498 to 499* of the report. The question of *res-judicata* cannot, however, be decided at this stage of the suit because the copy of the order of the District Judge in the previous revision Case is not on the record. In the absence of that order and also in the absence of other relevant papers bearing on the question of *res-judicata* I am not in a position to give by decision on this question. Certainly it will be open to the appellants to raise this issue in the trial Court when the suit is heard on the merits.

In the result, the appeal must fail. It is accordingly, dismissed.

Having regard to the circumstances of the case I direct that the parties will bear their own costs in this Court.

Leave to file an appeal under Clause 15 of the Letters Patent was asked for and refused.

P. K. D. *Appeal dismissed.*

APPELLATE CIVIL.

Before Mr. Justice Renupada Mukherjee.

NAZIBANNESSA BIBI

v.

MUSSAMAT MAHABAB BEGUM & OTHERS.*

Civil.

1955.

Feburary, 10, 21.

Civil Procedure Code, (Act V of 1908), Order 21, Rule 17 (2)—Application for execution, if barred by limitation—On the day when it purports to have been amended by the Executing Court.

Where it is found that the decree holder cannot proceed against the property originally included in the application for execution and where a supplementary list of properties is filed and accepted at a time when the application for execution has become barred, the supplementary list should be taken as a part of the original application under the provisions of O. 21, R. 17 (2) of the Civil Procedure Code or if a fresh application were at all necessary then the subsequent application furnishing a supplementry list of properties should be treated as one made in continuance of the application first presented and no case of limitation would arise.

Gnanendra Kumar Roy Chowdhury v *Rishendra Kumar Roy Chowdhury* (1) followed

The Full Bench case in *Asgar Ali* v. *Trailoky Nath Ghose* (2) can no longer be regarded as laying down good law on this point, in view of the amendment of O. 21. R. 17 which was substantially modified after the above mentioned Full Bench case

C.A.V.

Appeal by the judgment debtor.

Application for execution.

The material facts will appear from the judgment

Kalipada Sinha for the Appellant.

Nirmal Chandra Mukherjee for the Respondent.

The judgment of the Court is as follows :—

Renupada Mukherjee, J. :— The only question which for decision in this appeal is whether an application for

* Appeal from Appellate Order No. 91 of 1954 against the order of Sri Achinta Kumar Sen Gupta, Subordinate judge, 8th Court of District 24-Parganas at Alipore in *Misc.* appeal No. 678 of 1953 dated the 31st of March, 1954, affirming the order of Sri K. K. Mitra, Munsiff, 2nd Court dated the 14th September, 1953.

(1) (1918) 22 C.W.N 540.

(2) (1890) I.L.R 17 Cal. 631 (F.B.).

execution of a decree had become barred by limitation on the day when it purports to have been amended by the executing Court. The question has arisen in the following way :— The decree holders respondents obtained a decree against appellant Nazibannessa and some other persons in Money Suit No. 37 of 1943 on the 27th April, 1945 and the decree was put to execution against two of the judgment debtors, viz., appellant Nazibannessa and one Tulsi Bibi on the 19th August, 1945. The decree holder's prayed for attachment and sale of some properties of the judgment debtors and accordingly a sale was held on the 16th January, 1946 which was confirmed on the 19th February, 1946 and on the latter date the execution Case was disposed of on full satisfaction.

On the 27th April, 1949, an application was made under Or. 21 R. 90 of the Code of Civil Procedure by appellant Nazibannessa for setting aside the sale on the usual grounds of material irregularity and fraud in publishing and conducting the sale and also on some other grounds. The application was allowed on the 14th September, 1951. While setting aside the sale, it was held by the Court which disposed of the application that the properties of the judgment debtors were not clearly or sufficiently indentifiable from the description given and the Court which set aside the sale allowed the decree holder's time till the 25th September, 1951 for giving a proper description of the properties to be sold. On decreeholder's prayer time was extended till the 5th November, 1951. In the meantime an appeal was preferred by the decreeholder's and execution proceedings were stayed in the executing Court. The appeal was finally dismissed by the Appellate Court and the records were received by the executing Court on the 11th December, 1952. Thereafter time was taken by the decree-holder's for furnishing correct schedules and finally some correct schedules of properties were furnished on the 16th January, 1953 by the decreeholder's. On the last mentioned date the Court recorded the following order :—

> "Correct fresh schedule of properties furnished. Let this be treated as a part of the execution petition. Issue writ of attachment a fresh under Or. 21 r. 54 of the Code of Civil Procedure fixing 17.2.53 next for return and for

Civil.

1955.

Nazibannessa Bibi v. Mussamat Mahabab Begum

Renupada Mukherjee, J.

further orders."

Thereafter judgment debtor Nazibannessa filed an objection under Section 47 of the Code of Civil Procedure on the 13th May, 1953 contending that the submission of a fresh list of properties on the 16th January, 1953 amounted to a filing of a new application for execution and as this was filed more than three years after the final disposal of the previous application on the 19th February, 1946, the execution proceedings must be regarded as time barred. This contention was negatived by the executing Court and an appeal being preferred by the judgment debtor the appeal was also dismissed. So judgment debtor Nazibannessa has preferred this Second Appeal in this Court.

Mr. Sinha appearing on behalf of the judgment debtor appellant raised several contentions before me. He contended, in the first place, that the first application for execution of the decree was finally disposed of on the 19th February, 1946 and that the filing of a new list of properties on the 16th January, 1953 should be regarded as the starting of a new execution Case and not as a continuance of the old execution proceedings. In my judgment, there is no substance in this contention of Mr. Sinha. While setting aside the sale, on the 14th September, 1951, the executing Court held that the properties included in the original execution petition could not be sufficiently identified and so, that Court expressly gave time till the 25th September, 1951 for giving a proper description of these properties. Thereafter the date for giving a proper description of the properties was extended by the Executing Court from time to time till the 16th January, 1953 when the new list was furnished by the decreeholders. In the circumstances, it must be held that no new proceedings were started on the 16th January, 1953, and it must be held that the old proceedings continued. The executing Court apparently treated the new list as a part of the execution petition filed on the 10th August, 1945 and this meant that the old application for execution was simply amended. The first contention put forth by Mr. Sinha must therefore fail.

Mr. Sinha contended in the next place that even if it be regarded that the old application was amended on the 16th January, 1953, the amendment was made at a time when the execution petition itself had become barred and so the decree was no longer capable of execution on account of the bar of limitation. In support of this argument, Mr. Sinha relied on a Full Bench Case of this Court, *Asgar Ali* v. *Trailokya Nath Ghose* (1). But Rule 17 of Or. 21 of the Code of Civil Procedure which relates to amendment of execution petitions was substantially modified after the above Full Bench Case. I may refer only to sub-rule (2) of rule 17 which was introduced after the decision in the Full Bench Case was given. That sub-rule runs as follows :—

"Where an application is amended under the provisions of sub-rule (1), it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented."

The Full Bench Case can no longer be regarded as laying down good law on this point because after the amendment of rule 17 of the Code of Civil Procedure by the incorporation of sub-rule (2), it must be held that any amendment made in the original execution petition will be operative from the date of the presentation of the original application.

The last contention put forth by Mr. Sinha was that under the provisions of rule 17 of the Code, the Court may remove a defect or make an amendment which would be more or less formal in its nature, but it has no power to accept a new list of properties after the application for execution has become time barred because the acceptance of such a list would make the application for execution an altogether new one. In support of this contention Mr. Sinha relied upon *Gajanand Sha and others* v. *Doyanand Thakur* (2) In this connection Mr. Sinha also referred to *Gopal Parsharam Nanjoshi and others* v. *Damodar Janardan Bhagwat* (3), for the purpose of supporting

(1) (1890) I.L.R. 17 Calc. 631 F.B.
(1) [1943] A I R Pat. 127.
(2) [1948] A.I R. Bom. 353.

Civil.

1955.

Nazibannessa Bibi v. Mussamat Mahabab Begum

Renupada Mukherjee, J.

his contention that the inclusion of a wrong list of properties against which the decreeholders cannot proceed at all must be regarded as a material defect. Whatever view might have been taken in the two cases cited above, so far as our High Court is concerned, the view taken in *Gnanendra Kumar Roy Chowdhury & Ors.* v. *Rishendra Kumar Roy Chowdhury* (1), must prevail. It has been held in that Case that where it is found that the decree holder cannot proceed against the properties originally included in the application for execution and where a supplementary list of properties is filed and accepted at a time when the application for execution has become barred, the supplementary list should be taken as a part of the original application under the provisions of Or. 21 r. 17(2) of the Code, or if a fresh application were at all necessary, then the subsequent application furnishing a supplementary list of properties should be treated as one made in continuance of the application first presented and no Case of limitation would arise. Mr. Sinha contended that limitation in such a Case would not arise only if the supplementary list contains at least some of the properties of the original list but the Case cited above makes no such distinction. It would rather appear from the facts of that Case that the supplementary list contained properties wholly different from those included in the original list. I may mention that in the present Case rather it has been found by the Courts below that the supplementary list contains some of the properties of the old list. Be that as it may, the present Case appears to be concluded by the decision *Gnanendra Kumar Roy Chowdhury* v. *Rishendra Kumar Roy Chowdhury* (1), cited above and following that Case. I hold that the Court had power to make the amendment in question by treating the fresh list as a part of the original application. That being so, no question of limitation arises.

All the contentions put forth by Mr. Sinha fail. The appeal is therefore dismissed with costs to the decreeholders respondents.

R. M.

Appeal dismissed with costs.

(3) (1918) 22 C.W.N. 540.

APPELLATE CIVIL.

Before Mr. Justice Renupada Mukherjee.

SK. HABIL MONDAL

v.

SK. KALO AND OTHERS.*

Civil.

1955.

January, 14.

Finding of fact—Vitiated by wrong reading and construction of sale certificate—Must be set aside.

Sale certificate—If to be regarded as a document of title—If admissible under Sec. 13 of the Indian Evidence Act.

When the finding of the lower Appellate Court that the disputed lands are not comprised in the Plaintiff's sale certificate is vitiated by a wrong reading and construction of the sale certificate, it must be set aside.

A sale certificate should be regarded as a document of title and ought not to be lightly regarded.

Ramabhadra Naidu v. *Kadiriyasami Naicker.* (1) followed.

A sale certificate can be admitted in evidence under Section 13 of the Indian Evidence Act as a transaction by which the right to possession of the Plaintiff of the disputed plot was recognised.

Rani Basanta Kumari Dasi v. *Jnanendra Nath Ghosh* (2) referred to.

Appeal by the Plaintiff.

Suit for declaration of title to and confirmation of Khas possession of about 6 bighas of land.

The material facts will appear from the judgment.

Sitaram Banerjee and *Arun Kumar Dutt* (*Sr.*), for the Appellant.

J. K. Sen Gupta, Amal Kumar Mukherjee, Narayan Ranjan Mukherjee and *Nagendra Mohan Saha* for the Respondents.

Haridas Chatterjee for the Deputy Register.

The judgment of the Court was as follows :—

Renupada Mukherjee, J. :— The Plaintiff of the trial Court is the appellant of this appeal. He instituted a suit in the 3rd Court of the Munsif of Serampore, for declaration of his

*Appeal from Appellate Decree No. 810 of 1949 against the decree of Sri P. C. Raj Chowdhury, Sub-judge, 2nd Court of Dt. Hoogly at Chinsura in T.A. No. 211 of 1947, dated the 4th April, 1947 reversing the decree of Sri H. N. Sen, Munsif, 3rd Court, Serampore dated the 5th September, 1947.

(1) [1922] A.I.R. (P.C.) 252.
(2) [1940] A.I.R. Calc. 589.

Civil.

1955.

Sk. Habil Mondal v. Sk. Kalo

Renupada Mukherjee, J.

title to and confirmation of Khas possession of about 6 bighas of land described in schedule "Ga" of the plaint. The allegation of the plaintiff in brief was that this plot of land along with some other land belonged to one Yar Mahammad *alias* Bhulu Molla, appertaining to his jote of Rs. 17-8-0 under proforma defendants Nos. 6 to 10 and it was purchased by the plaintiff at a rent sale held at the instance of the landhlords on the 13th November, 1935. The plaintiff further alleged that soon after his purchase he obtained delivery of possession of the auction—purchased land including the disputed land and was in possession of the same. But the defendants Nos. 1 and 2 of the trial Court were threatening to dispossess him from the disputed land on the strength of an alleged purchase of the same from the heirs of Bhulu Molla, who were defendants Nos. 3 and 4 of the trial Court. The plaintiff further pleaded that the disputed land was wrongly recorded in C. S. Khatain No. 745 of Mouza Dunkuni as appertaining to another jote of Rs. 9/- of Bhulu Molla held under one Rajani Kanta Banerjee, deceased predecessor of proforma defendant No. 5, of the present suit.

The suit was contested in the trial Court by defendants Nos. 1 and 2 whose defence was that the land in suit really appertained to the jote of Rs. 9/- of Bhulu Molla and not to the jote of Rs. 17-8-0 as alleged by the plaintiff and that the said defendants were in possession of the suit land on the strength of a purchase from the heirs of Bhulu Molla.

The plaintiff's suit was substantially decreed by the trial Court but on appeal that decree was reversed by the lower Appellate Court and the suit of the plaintiff was dismissed. So the plaintiff has preferred this Second Appeal.

Two points arise for my determination in this appeal—the *first* point being whether the disputed land is covered by the sale certificate obtained by the plaintiff appellant in Rent Execution Case No. 577 of 1935 and *secondly* whether the said land appertains to the jama of Rs. 17-8-0 of Bhulu Molla. I shall take up these two points one after another.

Admittedly the suit land has been recorded in two plots in

Khatian No. 745 of Mouza Dunkuni, the numbers of plots being 310 and 78. The area of the first plot is .13 acres and the area of the second plot is 2.20 acres, the total area being 2.33 acres or 7 bighas.

In order to ascertain whether the above two settlement dags are comprised in the sale certificate of the plaintiff, a Commissioner was appointed for holding a local investigation and he was directed to find out whether these two dags are covered by plaintiff's sale certificate. The Commissioner accordingly held a local investigation and prepared a map and submitted a report to the Munsif. He located C.S. plots Nos. 78 and 310 and relayed the boundaries of the said plots with reference to the sale certificate of the plaintiff and after a comparision of the boundaries, he came to the conclusion that the said two plots are covered by plot No. 1 of the sale certificate of the plaintiff. The trial Court accepted this finding but the lower Appellate Court rejected this finding of the Commissioner.

Mr. Guha appearing on behalf of the contesting respondents submitted that the finding of the first Court of appeal on the question whether the disputed dags are covered by the plaintiff's sale certificate is a finding of fact and so it should not be disturbed in Second Appeal. I would have agreed with this contention if the learned Court of first appeal had not seriously misdirected himself in reading and construing the sale certificate. A reading of the sale certificate would show that three boundaries, viz., eastern, western and southern boundaries have been described by the use of the Bengali words "পূর্ব্ব, পশ্চিম, দক্ষিণ" in full. There is no mention of the Bengali word "উত্তর" regarding the northern boundary. Instead we find that after the description of the eastern boundary there is a Bengali letter "ও" after which the names of three boundary men have been mentioned. Both the Commissioner and the trial Court have come to the conclusion on a construction of the sale certificate that this letter "ও" is nothing but a slip for the Bengali word "উ" indicative of the northern boundary. This slip has been described by the Court of first instance as the "writer's devil". The lower appellate Court has not accepted this reading of the sale

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certificate by the Commissioner and the trial Court and it has construed the above letter as a conjunction indicating three other boundary men to the east of the disputed land. After persuing the sale certificate carefully, I am unable to accept this reading of the sale certificate by the lower appellate Court. The boundaries of plot No. 1 of the sale certificate have been described in detail. There is absolutely no reason why there should be an omission in the description of the northern boundary. Then again, the description of the eastern boundary—would show that there was the *sali* land of Hiru Poral and Korban Sheikh. Then occurs the contentious letter "ও".

After that letter the names of three presons are mentioned, *viz.*, Oul Fakir, Rahim Sk. and Inu Sk. After the name of Inu Sk. there is a statement that all the above mentioned three persons had *sali* land. If the letter "ও" had really meant to be used as a conjunction, then one would expect that the mention of *sali* land would have been made not after the name of Korban Sk. but after the name of Inu Sk. This is one aspect of the matter. Then again, the Commissioner had the advantage of seeing the position of the disputed land as also the lands of the boundary men in the locale. He compared the boundaries of the two disputed plots with the boundaries of plot No. 1 of the sale certificate after seeing all the lands in the locality. Thereafter he came to the conclusion that the disputed two plots are covered by plot No. 1 of the sale certificate. Such a finding of the Commissioner based upon an inspection of the locality should not have been set aside by the lower appellate Court with the scanty reasons given by him. There is also another important fact which has not been properly appreciated by the lower appellate Court. It was admitted in the trial Court that the plaintiff was in possession of the disputed land from the time of taking delivery of possession through Court until he was dispossessed by the respondents after their purchase from heirs of Bhulu Molla on the 10th April, 1946. The possession of the plaintiff is referable only to the sale certificate and such possession lends a strong support to the Case of the plaintiff that the disputed lands are covered by this sale certificate. The lower appellate Court has not appreciated this aspect of the Case properly when it makes an observation that the possession of the disputed land by the

plaintiff appears to be immaterial. In my judgment, the finding of the lower appellate Court that the disputed lands are not comprised in the plaintiff's sale certificate is vitiated by a wrong reading and construction of the sale certificate and so that finding must be set aside, and I agree with the learned Munsif that the disputed lands are covered by the plaintiff's sale certificate and the entry in the C.S. Khatian is correct :—

In the above connection, Mr. Guha argued that it is permissible to construe the sale certificate with reference to any extraneous document and in support of that contention he relies on the Case of *Promoto Nath Mazumdar* -vs- *Nagendra Nath Mazumdar* (1). That Case has no bearing on the facts of the present Case. Here the sale certificate has been read and construed by the trial Court not by reference to any extrinsic document but by simply considering and construing the sale certificate itself. The first point formulated by me is thus found in favour of the plaintiff appellant.

I now pass on to a consideration of the *second* point raised in this appeal, *viz.*, whether the disputed land appertained to the jote of Bhulu Molla bearing a rental of Rs. 17-8-0. Mr. Guha appearing on behalf of the respondents contended that as the plaintiff is seeking to eject the defendants, he is not entitled to get a decree merely on the basis of a sale certificate which is, at best, a statement of the landlords who put the holding upto sale, but the plaintiff must furnish additional materials to prove that the land in question really appertains to the jote of Rs. 17-8-0. In this connection, Mr. Guha argued that the sale certificate is not even admissible in evidence being an admission of the landlords only. In support of this contention, Mr. Guha cited two cases before me, one, *Joy Mangala Devi Misrani* v. *A. J. Shillingford & anr.* (2), *Ramani Pershad Narain Singh* v. *Mahanti Adaiya Gossain* (3). After going through these Cases I am of opinion that they are not applicable to the facts of the present case because in those Cases, the certificate purchaser was the decreeholder himself and, therefore, it was held that the statement made by him in the sale certificate cannot be used as evidence on his behalf. In the present Case, however, the auction purchaser was a third party and it is significant that both parties are claiming through

(1) (1929) 33 C W N 1211.
(2) (1915) 28 I.C. 173
(3) (1903) I L.R. 31 Cal. 380.

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Bhulu Molla who was the owner of the two jotes, one bearing a rental of Rs. 17-8-0 under proforma defendants Nos. 6 to 10 another bearing a rental of Rs. 9/- under proforma defendant No. 5. When the jote of Rs. 17-8-0 was put upto sale and it was described that the disputed land appertains to that jote, Bhulu Molla did not raise any objection.

Mr. Banerjee on behalf of the appellant contended that as Bhulu Molla did not raise any objection at that time, it was not open to the respondents who are purchasers from the heirs of Bhulu Molla to raise this objection now. I think there is much substance in this contention and although the plaintiff may not strictly invoke the aid of estoppel, he can very well say that in the circumstances of the case, the sale certificate should be regarded as his evidence of title and it should be made admissible in evidence against the contesting respondents. That a sale certificate should be regarded as a document of title and ought not to be lightly regarded has been held in several Cases. I may mention only one Privy Council Case on this point, *Ramabhadra Naidu v. Kadiriyasami Naicker* (1). The sale certificate can also be admitted in evidence under Section 13 of the Indian Evidence Act as a transaction by which the right to possession of the plaintiff of this disputed plot as appertaining to his jama of Rs. 17-8-0 was recognised—*vide* the Case of *Rani Basanta Kumari Dasi v. Jnanendra Nath Ghosh* (2).

Upon these facts and circumstances, I am of opinion that the title of the plaintiff has been sufficiently established by the sale certificate coupled with the possession of the plaintiff of the disputed land from the date of his taking delivery of possession through Court and the contention of Mr. Guha that this title should be proved beyond doubt by the papers of the sherista of the landlords must be rejected. The appeal must, therefore, be allowed.

In the result, the appeal is allowed, the judgment and decree of the lower appellate Court are hereby set aside and those of the trial Court restored.

The appellant will get costs of this appeal as also cost of the lower appellate Court from the contesting respondents.

Leave to appeal under clause 15 of the Letters Patent is asked for and refused.

R. M. *Allowed with costs.*

(1) [1922] A.I.R (P C.) 252.
(2) [1940] A I R. Cal 589.

ORIGINAL CIVIL.

Before Mr. Justice P. B. Mukharji.

MAHABIR CHANDRA GELADA

v.

SOHAN LAL BOID*

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1955

April, 4.

Calcutta Amendment of Order IX, Rule 9, Sub-rule (3) of Civil Procedure Code—Requirements of—Copy of application if to be served along with notice of motion—Notice of motion on the Original Side of High Court, what to include—Conflict between a rule on the Original Side of High Court and a statutory Provision—Which to Prevail.

A suit appeared on the peremptory list for hearing but no one appeared on behalf of the plaintiff as the Counsel engaged on behalf of the plaintiff was busy in another court actually cross-examining a witness. The defendant's Counsel was present. So the suit was dismissed with cost to the Defendant. Thereupon the plaintiff filed an application for setting aside the order of dismissal of the suit.

The Counsel for the defendant referred to the Calcutta Amendment of Order IX, Rule 9, Sub-rule (3), of Civil Procedure Code and argued that, only notice of motion and no copy of application having been served upon the opposite party, the application for setting aside the order of dismissal of the suit ought to be dismissed. The Counsel for the plaintiff, on the other hand, referring to a Rule on the Original Side of the High Court, contended that only notice of motion need be served upon the opposite party at first and copy of application may be served later on usual charges.

Held that, although it is true that ordinarily only notice of motion without the grounds need be served at first upon the opposite party, yet when there is statutory provision enjoining service of copy of application along with notice of motion the rule cannot be allowed to override the statutory mandate.

Service of notice of motion is on the Original Side of High Court service of the application itself within the meaning of the Calcutta Amendment of Order IX, Rule 9, of the Civil Procedure Code. The notice of motion is not only an intimation that an application will be made but has to set out in the body there of the very specific orders which are sought on the application. The requirements of the Calcutta Amendment of Order IX, Rule 9, of Civil Procedure Code are satisfied even by a "concise

*Application for setting aside the order of dismissal of a Suit (No. 1223 of 1953)

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statement" of the application and service of a full copy of the whole application is not necessary. Notice of motion on the Original Side of High Court is a concise statement of the apalication within the meaning of the Calcutta Amendment of Order IX, Rule 9, of Civil Procedure.

Sub-rule (3) of the Calcutta Amendment only prohibits an order being made under the rule unless notice of the application with a copy there of has been served on the opposite party and does not direct the Court to dismiss the proceeding. The provision is a penal provision and must be strictly construed. It means only that the Court will not make an order and does not mean that the Court will dismiss the pending application for setting aside the order of dismissal of the suit.

In the present case the order of dismissal was set aside on terms.

Application by the Plaintiff under order IX, rule 9, of Civil Procedure Code, for setting aside the order of dismissal of a suit.

The material facts will appear from the judgment.

Amiya Nath Bose for the Applicant.

K. C. Mukherjee for the Respondent.

The judgment of the Court was as follows :—

April, 4

P. B. Mukharji. J. :—This is an application to set aside an *ex parte* order of dismissal made on the 24th February, 1955. The application is made by the plaintiff. The suit appeared on the peremptory list for hearing on the 24th February, 1955. No one appeared on behalf of the plaintiff. It is now said in paragraph 16 of the petition used in support of the Notice of Motion and in explanation of the non-appearance that the learned Counsel engaged on behalf of the plaintiff was busy in another Court actually cross-examining a witness at the time when this suit was called on for hearing. The defendant's Counsel was present on that date, and it is alleged that he prayed for the dismissal of the suit. The suit was dismissed with costs to the defendant and certified for two Counsels.

It is unfortunate that only one Counsel was engaged for the plaintiff in this case although the claim in this suit is for about Rs. 30,000/-. An Attorney who briefs one Counsel for the hearing of a suit placed on the interlocutory Court

which is not able to reach suits every day due to interlocutory applications, takes thereby a big risk in these matters, and it is necessary for this Court to express its opinion that on that ground alone of his Counsel being busy elsewhere, it cannot always accommodate Attorneys specially when it is a matter which is certified as fit for the employment of two Counsels.

The merits of the case do justify in my view the setting aside of the order of dismissal on certain terms and conditions as to costs. For the fault of the Counsel, I do not think it will be in consonence with justice in this case that the plaintiff's claim, should be defeated. At the same time, failure to arrange for his counsel to appear or failure to make arrangement for more than one Counsel which has led to unnecessary costs being incurred by the defendant, must be compensated.

Mr. K. C. Mukherjee appearing for the defendant has drawn my attention to the Calcutta Amendment of Order IX, Rule 9 of the Civil Procedure Code, which says in Sub-rule (3) thereof: "No order shall be made under this Rule unless notice of the application (with copy thereof or concise statement as the case may be) has been served on the opposite party". Now in this case only the Notice of Motion was served on the respondent at first and not a copy of the petition in support thereof. In other words, the copy of the petition in support of the Notice of Motion was not served at the same time as the Notice of Motion was served on the respondent. It was, therefore, urged by Mr. Mukherjee appearing for the defendant that this application must be dismissed.

Mr. Amiya Nath Bose appearing for the plaintiff contends in defence, first, that this Rule in terms does not apply. Secondly, he contends that Sub-clause (2) of the Calcutta Amendment indicates that the applicant while presenting the application to the Court presents as many copies thereof on plain paper as there are opposite parties. From that provision he deduces that it is the obligation of the Court to

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serve the copies of what are called "application" under Order IX, Rule 9. This argument does not help Mr. Bose's client because, although no copy was served by the Court in this case on the respondent, yet Mr. Bose's client did not fulfil the primary obligation of supplying copies to the Court for such service. Thirdly, Mr. Bose contends that under the Rule on the Original Side of this Court only Notice of Motion need be served at first and copies later on on usual charges. To that the answer is that while it is true that ordinarily Notice of Motion need alone be served without the grounds at first, nevertheless where there is statutory provisions enjoining service along with the notice of the application copies of the application itself, then I think the Rules cannot be allowed to override such statutory mandate.

Then it was contended by Mr. Bose that Order IX, Rule 9 cannot prevail over the Rules of this Court. I have no hesitation in rejecting this argument also on the ground that there is no conflict on this particular point between Order IX, Rule 9 and the Rules of this Court, because I am of opinion that in this case the Notice of Motion could easily have been served with a copy of the petition in support thereof.

While Mr. Bose's arguments are not of very great assistance to help his client the plaintiff in this case, there are certain other considerations which in my judgment, should prevail. The first of such considerations is that what is required to be served is "a copy of the application." Now, an "application" may be treated as the Notice of Motion itself. There is no provision for a Notice of Motion in Ordinary Civil Courts to which this provision is normally attracted. Under the Civil Rules and orders an application in the Civil Court is made by presentation of a petition containing the prayer at the end thereof. No Notice of Motion as understood and provided for by the Rules of Original Side of this High Court, requires to be taken out in such cases although provision is there for Notice of such application to be given to the opposite parties. On the

Original Side of this Court an application is made on a Notice of Motion. The Notice of Motion is itself the application. What is stated at the foot of the Notice of Motion is only the "grounds" which are used in support of that application which is normally a petition or an affidavit but that petition or affidavit is not the application itself as it is in the case of other Civil Courts.

Therefore service of the Notice of Motion is on the Original Side of this Court service of the application itself within the meaning of the Calcutta Amendment of Order IX, Rule 9 of the Code. This Notice of Motion is not in general terms only an intimation that an application will be made but has to set out in the body thereof the very specific orders which are sought on the application. In fact the Notice of Motion is itself a summary of the relief wanted on the application. It must be emphasied that the requirements of the Calcutta Amendment of order IX, Rule 9 are also satisfied by a "concise statement" and a service of a full copy of the whole application is not necessary. I have no hesitation in holding that a Notice of Motion on the Original Side of this High Court is such a concise statement of the application within the meaning of the Calcutta Amendment of Order IX, Rule 9 of the Civil Procedure Code.

Apart from that reason, the second reason is that sub-rule 3 of the Calcutta Amendment only prohibits an order being made under that Rule unless notice of the application with a copy thereof had been served on the opposite party. What therefore the Court is prevented is from making an order, unless the condition there of service of the copy of the application itself must be dismissed. It only means that the Court will not make an order until a copy of the application has been served on the respondent. In this connection, one might recall the provisions in *Paramateria* such as are contained in Sec. 214 of the Indian Succession Act where it is stated that no decree shall be made by a Court unless certain conditions are satisfied and the Court in such cases does not dismiss the proceedings

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but does not make the decree until the condition is satisfied. Mr. Mukherjee, appearing for the defendant argues that in those cases the suit is pending and therefore the suit or proceeding is kept pending while the condition is required to be satisfied but here he contends that the application is already there and as the application has not satisfied the condition laid down by Sub-rule (3) of the Calcutta Amendment, it should be dismissed straight away. I am unable to accept this argument for many reasons but the first and foremost reason is that here also the Court adjourns the application and keeps it pending and does not make any order thereon until its copy has been served on the respondent. The second reason is that this is a Penal Provision which must be strictly construed. Therefore, if the statutory mandate is that no order shall be made, then it will be strictly followed and it means only that the Court will not make an order until the condition is satisfied. It will not read more into it and dismissed the pending application. It comports with the object of the Calcutta Amendment which is that an Order of dismissal should not be set aside without giving full opportunity to the respondent who has acquired a right or benefit by such order of dismissal and such full opportunity can only be given by not merely insisting on the notice of such application but also by insisting service on him of a copy of summary of the application itself. In this case the point of Mr. Mukherjee is of course worse than technical because he has not only received since the copies of the petition in support of the Notice of Motion but his client has actually answered it on affidavit and which affidavit he is using and relying on. The condition therefore laid down in the Calcutta Amendment of Order IX, Rule 9 to-day remain satisfied before me and I feel that this Court can and should make an order.

But the order setting aside the order of dismissal in this case must be on certain terms and conditions. The applicant must pay the costs of this application and all costs thrown away when the suit was dismissed for default on the 24th

February 1955 for his non-appearance. Payment of such costs I feel, should be made a condition precedent in this case. For the time being, I assess such costs to be Rs. 1500/- because the defendant had come with all his witness and had engaged his Counsel who appeared in Court and the defendant incurred heavy costs. This assessed cost include both the costs of this application as well as the costs of the suit thrown away and I direct that this be paid by the applicant's Solicitor to the respondent's Solicitor by the 19th April, 1955. The respondent's Solicitor will hold this sum without lien and subject to further orders of Court. I will however make this assesment of costs at Rs. 1500/- subject to taxation. The respondent's Solicitor will have his bill of costs for the application and for the costs of the suit thrown away taxed and the applicant's Solicitor will also pay for the costs of such taxation. There will be mutual undertaking as between Solicitors so that if the taxed costs are more than Rs. 1500/- the applicant's Solicitor will make good the extra amount and if they be less the respondent's Solicitors will refund the excess. In case this condition is satisfied, I set aside the ex-parte Order of dismissal of the 24th February 1955 and direct the suit to appear at the top of the propective list from 25th April, 1955 and direct the suit to appear at the top of the prospective list from 25th April, 1955 with liberty to the parties to mention to have a date fixed for its disposal. In default of making this payment, this application will stand dismissed with costs.

M. G. Poddar : Solicitor for the Applicant.
T. Banerjee & Co : Solicitors for the Respondent.

Application disposed of on terms.

P. K. D.

CIVIL REVISION.

Before Mr. Justice K. C. Das Gupta

and Mr. Justice S. N. Guha Roy.

CIVIL

1952

June, 4

SUNIL BARAN ROY CHOUDHURY

v.

PURNA CHANDRA CHANDRA*

West Bengal Premises Rent Control Act of 1950, Sec. 14 (4)—Order striking out defence, if appealable—If the Order can be interfered with Under Art. 227 of the Constitution, if no appeal preferred—Cl. (f) and Cl. (d) of the proviso to Sec. 12 (1) of West Bengal Premises Rent Control Act of 1950—Cl. (o) of Sec. 108 of the Transfer of Property Act.

An order under Section 14 (4) of West Bengal Premises Rent Control Act of 1950 directed the tenant defendant to put in arrears. The arrears not having been put in, as directed by the order, the defence was struck off. An appeal lies against an Order striking out defence. If no appeal is preferred, the order becomes find and can no longer be questioned. The order cannot be interferred with by High Court in exercise of its special Jurisdiction Under Article 227 of the Constitution of India.

Where there has been no material deterioration of the condition of the premises owing to tenant's acts of wasts or negligence, the case does not come within Clause (f) of the premises to Section 12 (1) of West Bengal Premises Rent Control Act of 1950. Where, however, the tenant by pulling down a door has done an act contrary to the provision of Clause (o) of Section 108 of the Transfer of Property Act, the case comes within Clause (d) of the proviso of Section 12 (1) of West Bengal Premises Rent Control Act of 1950.

Application for revision by the tenant Defendant Under Section 115 of Code of Civil procedure and Art 227 of the Constitution of India.

The material facts will appear from the judgment.

Provat Kumar Sen Gupta and *Somendra Nath Mukherjee* for the Petitioner.

A. K. *Sircar* and *Biswa Nath Dhar* for the Opposite Party.

*Civil Revision No. 1116 of 1952 against the Special Bench Appeal No. 2540 of 1951 of Court of the Judge, Court of Small Causes Calcutta and Order dated 4. 3. 52 arising out of ejectment Suit No. 293 of 1951 of the Judge 2nd Bench Court of Small Causes, Calcutta & Order dated 17. 11. 51.

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The Judgment of the court was as follows :—

K. C. Das Gupta. J. :—Two points were raised in this Rule. The first is that the learned judge acted wrongly in passing an order under Section 14 (4) of the West Bengal Premises Rent Control Act of 1950. The Second point urged is that in any case the Court of Appeal was wrong in making the decree.

It appears that the Order under Section 14 (4) directing the defendant to put in arrears was passed on 21st May 1951 and the deposit not having been made ultimately the defence was struck off by the end of 1951. The suit was taken up thereafter for exparte hearing and was dismissed by the leaned judge on the finding that there had been no proper service of the notice. On the appeal by the plaintiff it was decided by the Court of appeal on contest that the notice had been properly served and that the ground of waste and deterioration of the dismised premises had been made out.

As regards the first point it is important to notice that an appeal lay against the order striking out the defence. No appeal having been preferred that order has become final and cannot any longer be questioned we were asked to exercise our special jurisdiction under Article 227 of the constitution of India and to interfere with the order at this stage. In our judgment that would be an abuse of jurisdiction Special jurisdiction which this Court has under Article 227 is to be used to remeady defects of jurisdiction when no other remedy is possible in law. In this case the defendant had his remedy. He did not choose to take recorse to that remedy. It will be abused if we are to help him by acting under Act 227 of the Constitution. The first point therefore fails.

As regards the second point the learned Advocate tried to convince us that the judges in the court of appeal came to a wrong finding as regards the service of notice. In our judgment there was evidence which the Court could and did consider and it will not be right for this court to investigate

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the sufficiency of the evidence as if it was a Court of appeal. There is no justification for saying that because of the finding on the evidence that there was proper service there has been material failure of justice.

Lastly it was argued that, as there is no finding by the court of appeal that there had been material deterioration or the condition of the premises owing to the acts of waste and negligence which according to the court had been established, the case did not come within Cl. (f) of the proviso to section 12 (1) of the West Bengal Premises Rent Control Act 1950 and consequently the decree for recovery of possession should not have been made. Mr. Sircar appearing for the opposite party has contended that in any case it is clear that the case comes within Cl. (d) of the proviso as the tenant by pulling down the door has done an Act contrary to the provision of Cl. (o) of Section 108 of the Transfer of Property Act.

The Rule is accordingly discharged with costs.

Rule discharged

P. K. D.

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